Petition

81-1290

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In the Supreme Court of the United States

October Term, 1981

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania, and the PENNSYLVANIA DEPARTMENT OF EDUCATION,

Petitioners

v.

AMBER TOKARCIK et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a federal action, under the Education for All Handicapped Children Act, challenging a state administrative decision concerning the educational placement of a handicapped child may be brought as long as two years after the final administrative decision is made when, under the statute, no change in the child's placement can be implemented until all procedures, including such a federal court action, are exhausted?

2. Is performance of an ameliorative or preventive health service, such as clean intermittent catheterization by a school nurse, a "related service" required under the Education for All Handicapped Children Act and, therefore, required to be provided to respondent?

TABLE OF PARTIES BELOW

The following is the caption of the matter in the Court of Appeals which lists all parties before that Court. This petition is submitted on behalf of Robert Scanlon, Secretary of Education and the Pennsylvania Department of Education.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2844/2845

AMBER TOKARCIK, a minor by Nileleen N. Tokarcik, her parent and natural guardian, and MICHAEL G. TOKARCIK, and NILELEEN N. TOKARCIK

v.

FOREST HILLS SCHOOL DISTRICT, ROBERT L. BEYER, Secretary, and DR. WARREN E. HOWARD, individually and as Supt. of Forest Hills School District and PENNSYLVANIA DEPARTMENT OF EDUCATION, DR. ROBERT SCANLON, Secretary of Education of the Commonwealth of Pa.

(D.C. Civil No. 79-0338)

Forest Hills School District, Robert L. Beyer and Robert Anderson, defendants in D.C. Civil No. 79-0338,

Appellants in 80-2844

Pennsylvania Department of Education and Robert G. Scanlon, Secretary of Education, defendants in D.C. Civil No. 79-0338,

Appellants in 80-2845

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert G. Scanlon, Secretary of the Department of Education, Commonwealth of Pennsylvania and the Department of Education, Commonwealth of Pennsylvania, hereby petition that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered in this case on September 8, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

I. OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals, reproduced at 27a to 84a, is not yet reported.

The opinion and order of the District Court is unreported and is reproduced at 12a to 26a.

II. JURISDICTION

The judgement of the Court of Appeals was entered on September 8, 1981. A timely petition for rehearing *en banc* was denied on October 2, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions relevant to this petition are set forth verbatim in the appendix hereto:

The Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (1976):

Section 1401. Definitions

Section 1412. Eligibility requirements

Section 1415. Procedural safeguards

IV. STATEMENT OF THE CASE

This action was filed in the United States District Court for the Western District of Pennsylvania in March of 1979 by a handicapped school-age person and her parents who alleged that, because the child requires clean intermittent catheterization (CIC) during the course of the school day, she be provided CIC by her school district of residence as a related special education service under the Education for All Handicapped Children Act. 20 U.S.C. §§1401 *et seq.* Plaintiffs had been denied this service by their school district in the development of the child's individualized education program (IEP) for the 1978-1979 school year. Accordingly, plaintiffs requested an administrative hearing pursuant to both state and federal law.[1] The hearing examiner upheld the school district's position, that the school district was not legally required to provide CIC to the child. The examiner's decision was affirmed and adopted, on appeal to the Pennsylvania Secretary of Education, on December 22, 1978.

Thereafter, Plaintiffs filed this action in federal court, seeking to enjoin Robert Scanlon, Secretary of Education, the Pennsylvania Department of Education, and various officials of the Forest Hills School District to provide the minor plaintiff with CIC during the course of the school day as part of the program of special education and related services contained in her IEP. Plaintiffs based their claim upon the Civil Rights Act, 42 U.S.C. §1983, Section 504

[1] 20 U.S.C. §1415(b)(2) (93a); 24 Pa. Stat. Ann. §13-1372(1) (Purdon, 1980-81 Pocket Part).

of the Rehabilitation Act, 29 U.S.C. §794 and the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.*

Defendants Department of Education and Scanlon, respectively, filed a motion to dismiss and a motion for partial judgement on the pleadings on April 23, 1979. On May 19, 1980 the District Court, in a memorandum opinion, dismissed plaintiffs' claims against the Department of Education under the Civil Rights Act and the Rehabilitation Act and dismissed the monetary damages claims against defendant Scanlon (8a-9a).

Subsequently, all parties to this action filed motions for summary judgement. On October 31, 1980 the District Court granted plaintiffs' motion for summary judgement and the Court ordered defendants to provide minor plaintiff with CIC as long as she remains enrolled in defendant school district's special education program and is in need of such services (25a-26a).

In its opinion, the District Court first rejected defendants' argument that plaintiffs' action, pursuant to the Education of All Handicapped Children Act,[2] was barred as being untimely (16a-18a). The Court held plaintiffs' action to be in the nature of a *de novo* proceeding to which the analogous state statute of limitations for appeals from administrative decisions should not be applied (17a-18a). Accordingly, the Court sought the analogous state statute

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[2] 20 U.S.C. §1415(e)(2) provides parents of a handicapped child the right to bring an appeal in a United States District Court to contest the findings and decision of the state educational agency concerning the appropriate special education program to be provided to the child. See *Eberle v. Board of Public Ed. of Sch. Dist., Etc.*, 444 F. Supp. 41 (W.D. Pa. 1977), *aff'd* 582 F.2d 1274 (3rd Cir. 1978).

of limitations for *de novo* actions, and settled upon the two-year or six-year limitations for original actions (17a-18a).[3] Under either of these limitation periods the Court held the action to be timely brought. Second, relying upon the analysis of the Fifth Circuit in *Tatro v. Texas,* 625 F.2d 557 (5th Cir. 1980), the Court held catheterization to be a special education "related service" pursuant to the Education for All Handicapped Children Act and the Act's implementing regulations (18a-19a). The court held catheterization to be a school health service and the teaching of self-catheterization to be included within the definition of occupational therapy.

Defendants filed petitions for rehearing with the District Court, which petitions were denied. Accordingly, defendants appealed the District Court's injunctive order under 28 U.S.C. §1292(a)(1).

The Court of Appeals issued an order on September 8, 1981, per Judge Adams with Judge Rosenn dissenting, affirming the judgment of the District Court. The Court of Appeals, in so doing, agreed with and expanded upon the reasoning of the District Court.

In rejecting defendants' statute of limitations defense, the majority of the Court held plaintiffs' action to be original in nature and refused to apply thereto any state limitation period for appeals from administrative agency decisions.[4] The Court of Appeals held that it "must be

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[3] The District Court held that, "Pennsylvania uses either a two-year or six-year period for limitations to govern virtually all actions. We need not choose between the two . . ." (17a-18a).

[4] The Court relied upon the earlier decision in *Monahan v. Nebraska,* 491 F. Supp. 1074 (D. Neb. 1980). In that case, the Nebraska District Court also refused to apply a 30 day limitation

NOTE — *(Continued)*

guided by the aim of the federal statute in devising the limitation period in issue" (43a). In considering the aim of the Federal statute, the Education for All Handicapped Children Act, the Court concluded that application of the suggested 30 day state limitation period "would undercut in several respects the substantive and procedural protections the Congress intended to supply when enacting the Federal law" (46a). The protections which the Court opined would be undercut, were: first, the greater amount of time allegedly necessary to investigate and prepare for the filing of an action under Section 1415(e)(2) of the Education for All Handicapped Children Act (46a-47a); second, the role of the Federal Courts as an external check on the educational administrative system of the state (47a); and third, the statutory policy of cooperative parental and school district involvement in special education program and placement decisions (49a). Thus the Court of Appeals concluded that "the two year state statute of limitations,[5] which applies to actions to recover damages for injuries caused by the wrongful act or negligence of another, and controls in medical malpractice cases, is an appropriate referant" (55a).

NOTE — *(Continued)*

period, for state court appeals from administrative agency decisions, to a Federal action under the Education For All Handicapped Children Act. The Court found two six year limitation periods which it applied to plaintiff's action absent a more appropriate limitation. *Id.*, at 1085.

[5] 42 Pa. C.S.A. §5524 (Purdon, Supp. 1981) governs actions for assault, battery, false imprisonment, false arrest, malicious prosecution, malicious abuse of process, damages for personal injury, taking or injury to property, waste or trespass of real property, and against any government officer for nonpayment of money and nondelivery of proper y.

The Court also agreed with the District Court and held CIC to be within the scope of the Education for All Handicapped Children Act. First, the Court reasoned that because "special education specifically contemplates instruction in a regular classroom, related services necessarily include what is required within reason to make such a setting possible for a child who can benefit from it" (57a). Furthermore, the Court held that required related services may benefit handicapped children in contexts beyond education and that the related service need not be linked to the effort to educate (58a). Therefore, the Court concluded that CIC could be provided to the minor plaintiff as a "school health service"[6] pursuant to the implementing regulations.

Judge Rosenn, in his dissent, recognized that the Education for All Handicapped Children Act evidences a clear intent to expeditiously resolve questions concerning a handicapped child's placement. It was also Judge Rosenn's opinion that plaintiff's action was appellate, in nature, rather than original. Accordingly, he felt that the 30 day statute of limitations should have been applied to plaintiff's action.

It is from this September 8, 1981 decision of the Court of Appeals that defendants Scanlon, and the Pennsylvania Department of Education, hereinafter referred to as petitioners, seek a writ of certiorari.

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[6] 34 C.F.R. 300.13(a), 300.13(b)(10).

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents Questions of Great Public Importance

The Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* (hereinafter the "Act") is a funding statute intended to assist the states in providing an education for handicapped children. The primary condition of eligibility for the Act's funding is the provision of a "free appropriate public education" to all school-aged handicapped children[7] within the recipient's jurisdiction. 20 U.S.C. §1412(1) (89a). The nature of that education is only vaguely described. 20 U.S.C. §1401(18) (87a-88a). However, also required is the establishment of extensive procedures for determining the contours of the free appropriate public education to be delivered to each child on an individualized basis.[8]

One of the specific purposes of the Act is to resolve expeditiously questions concerning the appropriate special

[7] "Handicapped children" is defined as mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, and children with specific learning disabilities who by reason thereof require special education and related services. 20 U.S.C. §1401(1) (87a).

[8] These procedures include preparation of detailed individualized educational programs for each child, 20 U.S.C. §1401(19) (88a) and extensive due process, including both administrative hearings and appeals, and if necessary, federal court appeals. 20 U.S.C. §1415(92a-94a).

education placement of a handicapped child. Indeed, the implementing regulations set out strict timeliness governing the administrative process, including the school district hearing and the state agency review, such that the state agency decision must be issued within 75 days of the request for an administrative hearing. 34 C.F.R. §300.512 (1981). Yet, under the holding of the Court of Appeals, federal judicial review of the state agency decision could be sought as much as two years later.

Moreover, Section 1415(e)(3) of the Act requires that a handicapped child be maintained in the last agreed upon placement pending judicial review. *Stemple v. Board of Ed. of Prince George's Cty.*, 623 F.2d 893, 898 (4th Cir. 1980), *cert. denied,* U.S. , 101 S.Ct. 1348 (1981). Thus, pursuant to the Court's holding and the "stay put" provision of the Act, a change in placement or program for a handicapped child could be delayed for more than two years.[9] Such delay in a final placement decision for a handicapped child is wholly incongruous in light of the Act's purpose and defies common sense.

The possible effects of the holding of the majority of the Court would effect handicapped children nationwide. For example, in Pennsylvania alone, school districts propose changes in the educational placements and/or programs of as many as one hundred children each year, which

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[9] Though the Court of Appeals felt that Pennsylvania's two year statute of limitations was the "appropriate referant" (55a), the Court did not decide whether the two or the six year statute considered by the District Court was controlling. Since neither the District Court nor the Court of Appeals decided whether to apply a two year or six year statute of limitations, the delay could actually be for as long as six years.

proposals are contested by parents or guardians.[10] Under the holding in this case, each of those placements must be held in abeyance for over two years while proceedings, that is the *possibility* of appeal to federal court, under Section 1415 are pending.

Secondly, the initial decision to place a child in special education programs is also subject to the appellate process. 20 U.S.C. §1415 (b) (2) (93a-94a). Thus, absent parental agreement, children who are to be initially placed in special education programs could have their placement in those programs delayed for over two years while the same proceedings were pending. This could result in the exclusion of approximately 15,000 handicapped children, in Pennsylvania alone, from their appropriate programs of special education in a given year and for more than two years. Finally, a school district, which was opposed to a parental request for a change in program or placement of a handicapped child could avail itself of the procedures under Section 1415 of the Act and block any change for over two years.

None of these situations, each of which is clearly possible pursuant to the lower court's ruling, are consistent with the intent of the Act. In fact, the above situations are those types of situations—denial of free appropriate public education—which the Act was intended to prevent. It flies in the face of common sense to apply a two or six year statute of limitations to a federal court action to challenge a special education placement decision and prevent imple-

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[10] The approximate numbers of children used in these examples of the impact of the lower court's decision are based upon Pennsylvania Department of Education data concerning the number of administrative hearings held annually and the number of children who initially enter special education programs annually.

mentation of that decision—keep the handicapped child in the originally agreed upon program—for that period of time.

In addition, there is no limitation upon the number of times during a year that the parents of a handicapped child have the right to request a hearing. 20 U.S.C. §1415 (b) (2) (93a); 34 C.F.R. §300.506 (1981).[11] Thus, parents could request a hearing every year or every six months. This hearing could address the same questions which would be raised in the federal court action. Moreover, a handicapped child's IEP *must* be reviewed and, if necessary, revised *at least once a year.* 34 C.F.R. §300.343 (d) (1981). These procedural protections would in essence be negated by the application of a two year statute of limitations. Where there is a possibility of federal action under the Act, no change could be made in the placement pursuant to a new IEP for at least two years.

Finally, a handicapped child's level of academic functioning and educational needs change, as do those of all children. To provide for federal court review of a two year-old placement decision would result in the court reviewing matters which are stale. The sole purpose of the federal action under the Act is to challenge a decision to change the placement of a handicapped child. To delay this change for two or six years is clearly absurd.

The Court of Appeals holding on the statute of limitations defense is inconsistent with the Act; will result in

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[11] Section 1415(b)(2) specifically provides the parents of a handicapped child with the opportunity for an impartial due process hearing *whenever* they disagree with their school district concerning their child's program and placement. 20 U.S.C. §1415 (b)(2) (93a).

the above described harm, delay and uncertainty for handicapped children, their parents and school districts; and is, as discussed below, inconsistent with the principles, for application of a state limitation period to a federal action recognized by this Court in the recent decision in *United Parcel Services, Inc. v. Mitchell,* U.S. , 101 S.Ct. 1559 (1981).[12] Accordingly, this Court should grant review in this case.

The Court of Appeals' decision that CIC is a related service under the Act is also of such importance that this Court's review is called for. Under the lower Court's opinion, the nexus between special education and those related services necessary for a handicapped child to benefit from special education is abandoned.[13]

This decision opens the door for numerous children nationwide who suffer from handicapping conditions but are not in need of special education as required by the Act[14] to receive related services from their local school districts. Such result will transform the Act from an education statute to a health care and treatment statute for handicapped children and depart completely from the original intent of Congress.

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[12] See pp. 14-16, *infra.*

[13] The Act defines related services as those services "as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. §1401(17) (87a). In contrast, the lower court concluded that "related services necessarily include what is required within reason" to make instruction in a regular classroom possible for a handicapped child (57a). Thus, a handicapped child in a regular classroom could receive related services regardless of any need for special education. This is clearly contrary to the intent of the Act.

[14] 20 U.S.C. §1401(1) (87a); 34 C.F.R. §300.14(a) (1981).

Moreover, the Court, through its decision that CIC is a school health service, has insured significant expansion of the types of school health services traditionally provided to *all* students under state law by Pennsylvania[15] and other states. As an ameliorative health service, CIC is akin to transfusions, administration of medication, injections, orthopedic devices, iron lungs and renal dialysis machines, to name but a few. If the Court of Appeals' decision is permitted to stand, any and all of these services could be required for a child with a handicapping condition who attends a public school program, regardless of whether that child is in need of or is receiving any special education. Under the Court of Appeals decision such services would undoubtedly also be considered as related services which would be the responsibility of the child's school district to provide. Thus, school districts would become major health care providers for handicapped students. The provision of such health care under the guise of related services would be an undue and substantial burden on available state and federal funds for special education.

Pennsylvania and other states appropriate a fixed sum annually for special education and related services for handicapped children. Rational and equitable administration requires that certain rules be established to guide that process. The state law limitation on mandated school health services is one such rule. However, it has been vitiated by the lower court's decision. Where once school districts in Pennsylvania budgeted for limited diagnostic

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[15] The school district health services mandated by state law are diagnostic in nature, including the performance of certain health examinations and the maintenance of certain health records. 24 Pa. Stat. Ann. §14-1402 (Purdon, 1962, 1980-81 Pocket Part).

services,[16] they must now be prepared to increase their budgets, and expend limited special education dollars for not only CIC but also many other of the ameliorative health services noted above. The Court's holding CIC to be a related service and, more particularly, a school health service impacts not only upon Pennsylvania, but upon numerous other states.[17] The ultimate impact of the lower court's decision will be an increase in the provision of health care related services and a decrease in the provision of special education.

The Court's decision that CIC is a related service imposes significant health care burdens upon school districts, additional and expensive burdens which will result in concomitant reductions in the provision of special education and other services. As is established below, it is also contrary to the language of the Act. Therefore, this Court should grant review in this case.

B. The Decision Below Conflicts With a Decision of This Court Concerning Application of the Analogous Statute of Limitations for a Federal Action

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The majority opinion of the Court below overlooked this Court's recent decision in *United Parcel Service, Inc. v. Mitchell,* U.S. , 101 S.Ct. 1559 (1981). Accordingly, that opinion is in conflict with *United Parcel* and should be reviewed by this Court.

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[16] See n. 15, *supra.*

[17] In *Tatro, supra,* the issue of whether or not CIC is a related service is being litigated by the Sta e of Texas.

United Parcel involved the question of the analogous state statute of limitations[18] to be applied to an action filed under §301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a). In that case the shorter of two proffered statutes of limitation was applied. First, application of the shorter statute was supported by a refusal to characterize plaintiff's action as original in nature. *Id.*, at 1563-1564. The same reasoning should and must be applied here. The majority of the Court below characterized respondents' action as original under Section 1415(e) (93a). However, the majority of the panel, in so doing, overlooked the appellate nature of respondents' action, which was a direct result of and was taken to overturn, petitioner's administrative determination made pursuant to Section 1415 (c) of the Act. 20 U.S.C. §1415(c) (93a). The Court of Appeals decision conflicts with *United Parcel* insofar as that Court did not even consider the appellate nature of respondents' claim.

Application of the shorter state limitation period in *United Parcel* was also grounded upon avoidance of the undesirable and unworkable end of having the results of the grievance and arbitral process being suspended in limbo for several years. *Id.* at 1564-1565. In the case at hand, as discussed in the dissenting opinion,[19] analogous

[18] Petitioners interposed a statute of limitations defense in the instant matter because the Act was silent regarding the limitations period for filing a federal court action under Section 1415(e). Petitioners argued that the analogous state statute in this case would be a 30 day limitation for review of state agency decisions in state court (44a-46a). 42 Pa. C.S.A. §5571(b) (Purdon, 1980 Pamphlet).

[19] Judge Rosenn, in his dissent, espoused a view similar to that taken by this Court in *United Parcel*. He concisely concluded his dissent as follows:

NOTE — *(Continued)*

considerations should be applied to expedite the filing of a federal action under the Act. 20 U.S.C. §1415(e)(2) (93a-94a). To hold in abeyance a decision concerning the appropriate special education placement of a handicapped child, such as the minor respondent, is not only unworkable and undesireable—thus in conflict with this Court's decision in *United Parcel*—but is also clearly contrary to the intent of the Act.[20]

C. The Court of Appeals Erroneously Held That the Education for All Handicapped Children Act Requires That School Districts Provide Clean Intermittent Catheterization to Handicapped Children

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The Court of Appeals erred in interpreting the scope of the Act to include CIC as a related service. The Act is relatively silent on this point, as related services are only vaguely defined in the Act:

NOTE — *(Continued)*

I quite simply am unable to see any justification for prolonging any longer than absolutely necessary disputes concerning the appropriate educational placement of a handicapped child. The mere existence of the dispute is evidence that one party—either the child's parents or the schools—believes that the current placement is inappropriate. Thus, although the majority is perhaps correct in characterizing the status quo ante as 'second best' because it was the most recently agreed upon, it still is arguably not the best. I am convinced that every week a handicapped child spends in an improper educational program retards his or her development, and I therefore believe that expeditiousness is indeed the key to effective administration of Section 1415.

(83a).

[20] See pp. 8-11, *supra*.

> The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic, and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. §1401(17) (87a). The implementing regulations are, however, more specific and include among the listed related services "school health services."[21] In so doing, the regulations go well beyond the language of the statute which limits medical services to services for "diagnostic and evaluation purposes only." 20 U.S.C. §1401 (17) (87a). Clearly, as defined by the regulations and applied by the lower court, "school health services" include "medical services" beyond those required for "diagnostic and evaluation purposes." CIC is one such service.

In finding that CIC would be a "school health service" and, therefore, a related service under the federal regulations implementing the Act (59a-60a), the lower court also ignored the rather explicit provisions of state law concerning mandatory school health services and expanded upon the types of school health services which the Pennsylvania legislature mandated be provided to *all* students.[22] Having recognized, in a prior case, that it is state

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[21] School health services are defined rather broadly as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. §300.13(b)(10).

[22] See n. 14, *supra*.

law to which the court should look in the absence of a clear federal mandate,[23] the Court of Appeals clearly erred in not looking to the clear state legislative directive providing for school health services. Therefore, even assuming that the federal regulation concerning "school health services" is legal,[24] CIC is not a "school health service" which a school district might be required to provide to a handicapped child as a related service under the Act.

Moreover, the lower court clearly required CIC to be provided to handicapped children, such as respondent, regardless of whether or not those children are also receiving special education. The Act provides that handicapped children are to receive special education *and* related services.[25] There is no language in the Act which would support the proposition that related services must be provided independent of special education. In other words, the Act does not provide for either special education or for related

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[23] The decision of the Court of Appeals in *Battle v. Commonwealth of Pennsylvania*, 622 F.2d 269, 278 (3rd Cir. 1980), *cert. denied*, U.S. , 101 S.Ct. 3123 (1981), stands for the proposition that one should look to state law for clarification in the absence of specific direction in the Education For All Handicapped Children Act itself.

[24] See, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), where this Court observed that regulations exceeding the authority of the statute they are implementing are subject to attack.

[25] The definitional section of the Act defines handicapped children as children with certain enumerated handicapping conditions "who by reason thereof require special education *and* related services." 20 U.S.C. §1401(1) (87a) (emphasis added). It also defines free appropriate public education as "special education *and* related services." 20 U.S.C. §1401(18) (87a-88a) (emphasis added).

services. If a child requires only a related service, the Act is inapplicable.

However, because that Court interpreted "classroom instruction" to mean instruction in a regular classroom, it held that among those related services required by the Act are those which are reasonably required to make a regular class placement possible for a handicapped child (57a). The above conclusion is based upon the erroneous interpretation of classroom instruction as being regular education, and therefore, subsumed within special education.[26] Special education, however, is specially designed instruction, not regular education, and it may include instruction in various locations, such as a classroom, at home, in a hospital or in an institution. 20 U.S.C. §1401(16) (87a). Though a handicapped child may attend regular class for some or all of the child's educational program such regular class instruction is distinct from and subject to different requirements than the child's special education program. Therefore, pursued to its logical conclusion, the lower court's decision appears to have done away with the express statutory nexus between special education and related services. 20 U.S.C. §§1401(1) (87a), 1401(18) (87a-88a).

Because of these errors on the part of the Court of Appeals, this Court should grant review in this case and reverse the decision of the lower court.

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[26] The Court's opinion recited the following exerpt from the definition of special education: "specially designed instruction at no cost to parents or guardians to meet the unique needs of a handicapped child, *including classroom instruction.*" 20 U.S.C. §1401(16) (87a) (Emphasis by the Court). However, special education is defined to *include* "classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions." *Id.*

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgement of the Court of Appeals for the Third Circuit in this case.

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Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-338

AMBER TOKARCIK, a minor, et al.,
Plaintiffs

vs.

FOREST HILLS SCHOOL DISTRICT, et al.,
Defendants

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff, Amber Tokarcik, is a third grade student in the Forest Hills School District in Cambria County. She was born with spina-bifida, a congenital physical defect which has left her paralyzed from the waist down. Because of her condition, she is unable to void naturally and, therefore, requires catheterization every three or four hours. When Amber entered kindergarten in 1976, her parents, also plaintiffs in this suit, requested the personnel of the Forest Hills School District to perform the necessary catheterization at least once a day. The district re-

fused and Amber's mother or some other adult member of the family has had to go to the school to perform the catheterization each day.

This suit has been brought against Forest Hills School District, its secretary and superintendent, the Pennsylvania Department of Education, and its secretary, Dr. Robert Scanlon, to force the school district to provide the catheterization, and to recover compensatory and punitive damages. The plaintiffs plead violations of 42 U.S.C., Section 1983, the Rehabilitation Services Act and the Education of the Handicapped Act. The Rehabilitation Act provides, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C., Section 794. The Education of the Handicapped Act is a funding act designed to provide federal assistance to states for the education of the handicapped. In order to receive assistance, the state must have a policy "that assures all handicapped children the right to a free appropriate public education," 20 U.S.C., Section 1412(1). To this end, a state "to the maximum extent practicable," must provide "special services to enable such children to participate in regular educational programs." 20 U.S.C., Section 1414(a) (1) (C) (IV).

Defendant, the Pennsylvania Department of Education, has filed a motion to dismiss on the following basis: (1) no private cause of action exists under the Rehabilitation Act; (2) the Department is not a "person" within the meaning of 42 U.S.C., Section 1983; (3) the Department is immune to suit pursuant to the 11th Amendment;

and (4) the only jurisdiction the court has under the Education of the Handicapped Act is to review an administrative determination, and this suit, construed as an appeal from such a determination, was untimely filed. Defendant Scanlon has filed a motion for partial summary judgment to the extent that the complaint seeks damages from him, arguing alternatively that the 11th Amendment prohibits such an action, and that the complaint does not allege the requisite personal involvement. Both defendants have additionally moved to dismiss the complaint because they were acting at all times relevant to this suit in a quasi-judicial capacity.

We conclude that the Department of Education may not be sued for a Constitutional violation pursuant to 42 U.S.C., Section 1983; neither may it be sued under the Rehabilitation Act. Further, to the extent that the complaint seeks damages from the Defendant, Scanlon, it must be dismissed. We decline to reach the question of whether the claim under the Education of the Handicapped Act was timely filed pending the submission of briefs on the law of laches.

Section 1983

Plaintiffs concede that the Department of Education is not a person within the meaning of Section 1983. Therefore, the Section 1983 cause of action against the Department must be dismissed.

The Rehabilitation Services Act

The Supreme Court recently declined to reach the question of whether the Rehabilitation Act gives rise to a private cause of action. *Southeastern Community Col-*

lege v. Davis, 442 U.S. 397 (1979). We rely then on law in this Circuit which recognizes a private cause of action, *Doe v. Colautti,* 592 F.2d 704 (1979). However, we further conclude that when the defendant sued is a state Department of Education, the action is barred by the 11th Amendment.

The 11th Amendment, of course, bars suits brought against a state by its own citizens, absent its consent. However, the absolute bar of the 11th Amendment has been modified by several cases which have determined that Congress may provide for citizen suits against a state when acting within its constitutional powers. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Parden v. Terminal R. Co.,* 377 U.S. 184 (1963). In *Parden,* a citizen brought suit under the FELA against a railroad company wholly owned by a state. The Court determined that it must address two questions in order to decide the issue before it: "(1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances?; and (2) Did it have the power to do so, as against the State's claim of immunity?" *Id.* at 187. The Court answered both questions in the affirmative. The FELA, by its terms, applied to *every* common carrier, and in enacting it, Congress was acting within the scope of the commerce clause.

Two subsequent cases demonstrated the importance of the Court's first question in *Parden.* In *Edelman v. Jordan,* 415 U.S. 651 (1973), the Court refused to allow a suit against a state pursuant to the federal act authorizing the Aid to the Aged, Blind or Disabled program, which funnels money to individual recipients through the states. "The mere fact that a State participates in a program

through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in federal courts." *Id.* at 673. *Edelman* was not like *Parden* because "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." *Id.* at 672.

Likewise, the Rehabilitation Act does not include express authorization to sue States. As indicated above, the Rehabilitation Act does not include express authorization to sue anyone. The fact that the State accepts monies under the Rehabilitation Act is not sufficient to overcome the bar of the 11th Amendment.

The Action for Damages Against Scanlon

An action may be brought against an official of a state, despite the 11th Amendment, if it is limited to prospective injunctive relief, *Ex parte Young,* 209 U.S. 123 (1908), and to damages that are recoverable from the individual personally, *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459 (1945). But a complaint seeking damages must allege personal involvement by the individual in the commission of the wrongful acts giving rise to the suit. An official cannot be held liable on the basis of *respondeat superior* alone. *Downs v. Department of Education,* 368 F. Supp. 454 (E.D. Pa. 1973).

In *Dawes v. Philadelphia Gas Commission,* 421 F. Supp. 806 (E.D. Pa. 1976), the Court dismissed an action against individual defendants because the complaint merely described the individuals' official capacities and areas of responsbility and did not allege any direction, participa-

tion or acquiescence on their part in the challenged policies. Likewise, in this complaint, Scanlon is identified twice as the Secretary of Education, and no other allegations are made. Therefore, to the extent that the complaint seeks damages from Defendant Scanlon, it must be dismissed.

Quasi-Judicial Immunity

The complaint alleges that Secretary Scanlon's predecessor in office, Caryl Kline, affirmed the decision of a lower authority in the Department of Education that the Forest Hills School District was not required to provide Amber Tokarcik with catheterization services. Because Dr. Kline was acting in a quasi-judicial capacity, defendants argue they are immune from suit.

Whether Dr. Kline was acting in a quasi-judicial capacity or not, the Education of the Handicapped Act provides that an adverse decision by such an official may be appealed to the district court. Clearly, defendants are not immune from such an appeal.

The other claims against the Department have been dismissed. As to the other claims against Defendant Scanlon, plaintiffs are not complaining simply of the adverse decision by Dr. Kline. Boldly stated, their contention is that he is failing to provide Amber Tokarcik with services which the 14th Amendment and the Rehabilitation Act require him to provide. That failure is certainly manifested by Dr. Kline's determination upholding the Forest Hills decision to withhold the catheterization services. But it is also manifested on a daily basis, by his continual failure to direct Forest Hills to provide the services, or to provide the services themselves. This is not

quasi-judicial behavior. Furthermore, if anyone ever acted in a quasi-judicial capacity, it was Dr. Kline and not Dr. Scanlon. Clearly, he is not entitled to immunity because the prior action of Dr. Kline might be characterized as quasi-judicial in nature.

An appropriate Order will be issued.

(s) Alan N. Bloch
United States District Judge

Dated: May 19, 1980

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-338

AMBER TOKARCIK, a minor, et al.,
Plaintiffs

vs.

FOREST HILLS SCHOOL DISTRICT, et al.,
Defendants

ORDER

AND NOW, this 19th day of May, 1980, it is hereby Ordered that:

(1) Defendant Pennsylvania Department of Education's Motion to Dismiss is granted in part, to wit:

(a) Plaintiffs' cause of action against the Department under 42 U.S.C., Section 1983, is dismissed; and

(b) Plaintiffs' cause of action against the Department under the Rehabilitation Services Act is dismissed.

That part of the Department's Motion seeking dismissal of the Plaintiffs' cause of action against it under the Education of the Handicapped Act will be decided at a later date.

(2) Defendant Dr. Robert Scanlon's Motion to Dismiss that part of Plaintiffs' complaint against him seeking monetary damages is dismissed.

(3) Defendants Pennsylvania Department of Education and Dr. Robert Scanlon's Amended Motion to Dismiss is denied.

(s) Alan N. Bloch
United States District Judge

Dated: May 19, 1980

cc: Counsel of Record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-338

AMBER TOKARCIK, a minor, et al.,
Plaintiffs

vs.

FOREST HILLS SCHOOL DISTRICT, et al.,
Defendants

ORDER

AND NOW, this 4th day of June, 1980, upon consideration of the Motion to Clarify Opinion and Order filed on June 2, 1980, by defendants, Pennsylvania Department of Education and Dr. Robert Scanlon,

IT IS ORDERED that said Motion is GRANTED, and the prior Order entered by this Court on May 19, 1980, is hereby modified to read:

> "Defendant Dr. Robert Scanlon's Motion to Dismiss that part of Plaintiff's Complaint against him seeking monetary damages is GRANTED."

(s) Alan N. Bloch
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
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Civil Action No. 79-338

AMBER TOKARCIK, a minor, et al.,
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vs.

FOREST HILLS SCHOOL DISTRICT, et al.,
Defendants

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff, Amber Tokarcik, is a third grade student in the Forest Hills School District in Cambria County. She was born with spina-bifida, a congenital physical defect which has left her paralyzed from her waist down. Because of her condition, she is unable to void naturally and, therefore, requires catheterization every three or four hours. When Amber entered kindergarten in 1976, her parents, also plaintiffs in this suit, requested the personnel of the Forest Hills School District to perform the necessary catheterization at least once a day. The District refused and Amber's mother or some other adult member of the family has had to go to the school to perform the catheterization each day.

Plaintiffs seek an injunction forcing defendant Forest Hills School District to provide the catheterization, and compensatory and punitive damages. The plaintiffs plead violations of 42 U.S.C., Section 1983, the Rehabilitation Services Act and the Education for All Handicapped Children Act. By earlier order, plaintiffs' claims brought pursuant to Section 1983 and the Rehabilitation Services Act against the Department of Education were dismissed, as was the Section 1983 damages claim against the defendant Scanlon. The claims brought pursuant to the Handicapped Act remain against all defendants. Turning our attention to these claims, we find them sufficient to warrant the granting of plaintiffs' motion for summary judgment. We will issue an order directing defendant Forest Hills School District to catheterize plaintiff Amber Tokarcik as necessary. We will also direct defendants to bear the costs of this action. The question of damages and attorney's fees will be resolved at a later date pending briefing by the parties and a possible evidentiary hearing.

The Education for All Handicapped Children Act of 1975, 20 U.S.C., Sections 1401-1461, is essentially a funding statute, designed to provide financial assistance to state school systems in the wake of increased judicial and legislative awareness of the rights of the handicapped. [1975] U.S. Code Cong. & Ad. News 1425, 1430. To receive the funds available pursuant to the Act, a state must guarantee a "free appropriate public education" to all handicapped children. 20 U.S.C., Section 1412(2)(B). A "free appropriate public education" is defined by the Act as "special education and related services which . . . are provided in conformity with (an) individualized education program." *Id.*, Section 1401(18). An individual-

ized education program (IEP) is a "written statement for each handicapped child" developed by consensus by the child's parents, teacher, and a qualified school representative. *Id.*, Section 1401(19). Other than directing that the IEP should set educational objectives for the child, list the services to be provided to meet those objectives, and provide criteria for measuring whether the objectives are being achieved, *id.*, the Act provides no guidance for determining the substantive content of an appropriate program. Presumably, however, an appropriate program would respond to the Act's mandate that handicapped children be educated together with non-handicapped children "to the maximum extent appropriate." *Id.*, Section 1415(b)(1)(E).

The Act provides parents with any complaint about the education of their handicapped child with a right to a due process hearing before an independent hearing examiner, and a right of appeal to the state education agency from an adverse decision by the examiner. *Id.*, Sections 1415(b)(2), 1415(c). If this administrative procedure does not resolve the conflict, the parents may bring suit in a state or federal court. *Id.*, Section 1415(e). The court is to receive the record of the administrative hearings and, in addition, must hear any additional evidence presented by any party. *Id.*, Section 1415(e)(2).

The only additional evidence presented in this case has come to the Court by way of a short set of stipulations. We have relied most heavily on the administrative record.

It is unclear from that record whether a formal IEP has ever been prepared for the plaintiff, Amber Tokarcik.

However, it is clear that the parents met with representatives of the Forest Hills School District and together they agreed on most of the elements of Amber's educational program. Some difficulties arose early on over transportation and physical education, but these have apparently been resolved. Only one problem remains—Amber's parents continue to ask the school to direct someone from its staff to catheterize Amber once or twice a day, and the School continues to refuse.

Amber's parents sought a due process hearing before a hearing examiner to resolve this dispute. At the hearing, the School District argued that Pennsylvania law does not require school nurses to catheterize students. If Amber's mother could not come to the school to catheterize her, the school would be forced to find a "special education placement" for Amber, presumably at home, with a home-bound tutor. Plaintiffs presented the testimony of Dr. Annette Lynch, Director of the Bureau of Children's Services in the Pennsylvania Department of Health, who oversees the work of school nurses and who testified that the general duties of school nurses would include catheterization.

Dr. Lynch also explained why Amber could not be catheterized prior to coming to school, the catheter to remain inside Amber with a bag attached to catch fluid throughout the day. Apparently, this type of procedure was generally used up until about 1966, when it was discovered that the relatively short life span of individuals with non-functioning bladders could be directly attributed to bacterial infections caused by indwelling catheters. Moreover, it was discovered that the infections resulting

from indwelling catheters did not travel up the catheter and into the bladder but were caused by the distending of the kidney wall by the catheter. Thus, even the utmost attention to asceptic detail could not prevent the infections. Since that time, intermittent catheterizaion—that is, inserting the catheter every three to four hours, draining the fluid then collected in the bladder and thereafter immediately removing it—has been the standard procedure. Furthermore, it is no longer considered a surgical procedure but can be done by anyone with a small amount of training.

The hearing examiner found in favor of the School District, and his decision was affirmed on December 22, 1978, by Dr. Caryl Kline, then Secretary of the Department of Education This case was docketed March 14, 1979.

Before coming to the merits of this case, we must first address a procedural question raised by the defendants Department of Education and Dr. Scanlon. The Education of All Handicapped Children Act does not contain a statute of limitations governing the time in which parents aggrieved by the decision of a state educational agency must file their suit in state or federal court. Defendants argue correctly that the court must look therefore to analogous state law to determine the applicable statute of limitations. They argue the analogous state law is that law governing judicial appeals from administrative agencies, which law requires such appeals be filed within thirty (30) days from the agency decision. Since this case was filed more than thirty days from Dr. Kline's decision, defendants argue this action i untimely.

However, we reject defendants' characterization of this action as an appeal from an agency decision. Nothing in the statute would lend support to such a characterization. 20 U.S.C., Section 1415(e)(2) provides: "Any party aggrieved by the findings and decision (of a state education agency) . . . shall have the right to bring *a civil action* with respect to the complaint presented pursuant to this section, which *action* may be brought . . . in a district court . . . the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate" (emphasis added). Contrast the procedure set forth in this provision to the procedure governing appeals of administrative decisions by Pennsylvania Administrative Agency Law, 71 P.S., Section 1701 *et seq.*, which defendants ask us to apply. "The court to which the appeal is taken shall hear the appeal . . . on the record certified by the agency. After hearing, the court shall affirm the adjudication unless it shall find that the same is in violation of the constitutional rights of the appellant, or is not in accordance with law, or . . . that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. . ." 71 P.S., Section 1710.44. The Pennsylvania law is in conformity with general administrative practice. *See* Davis, Administrative Law Text, Chapter 29.

The court action contemplated by the Education for All Handicapped Children Act is clearly in the nature of a *de novo* proceeding, and as such should be governed by statutes of limitation for *de novo* actions. Pennsylvania

uses either a two-year or six-year period of limitations to govern virtually all actions. We need not choose between the two, nor decide whether the period begins to run from the date of Dr. Kline's decision or from the date of the School District's most recent refusal to provide the services sought, because using any one of these rules or dates results in a conclusion that this action was timely brought.

We now turn to the merits of plaintiffs' claim. Unfortunately, we find ourselves without the benefit of a large body of judicial analysis in this relatively new area of the law. However, the Fifth Circuit recently confronted the very question before us today, *Tatro v. Texas,* slip. op. filed September 2, 1980. Their analysis of the problem is compelling and we reach the same result they did. Furthermore, the Third Circuit also recently had occasion to examine the Handicapped Children Act in response to a different question, *Battle v. Pennsylvania,* slip. op. filed July 15, 1980. In *Battle,* the Court emphasized that an appropriate education for a handicapped child is one that responds to her individual needs.

As noted above, the "free appropriate public education" which the Act requires be provided to all handicapped children is made up of two components, special education and related services. Special education means "specially designed instruction . . . to meet the unique needs of a handicapped child. . ." 20 U.S.C., Section 1401(16). Related services means "transportation, and such developmental, corrective, and other supportive services (including . . . occupational therapy . . .) as may be required to asist a handicapped child to benefit from special education. . .", *id.,* Section 1401(17). Regulations implementing the Act construe related services to also in-

clude "school health services," defined as "services provided by a qualified school nurse or other qualified person." 45 C.F.R., Section 121a. 13(b)(10).

Clearly, catheterization falls outside the definition of "special education," and, to be required by the act, must be a "related service." More specifically, it must be a "supportive service," being neither transportation, nor developmental or corrective. Not all supportive services are listed in the Act. However, we find within those that are listed one which we feel includes catheterization, or at least supervision and instruction in self-catheterization. In addition, catheterization appears to us to be clearly a school health service, and a school health service appears to us to be clearly a supportive service.

At the request of the School District, Amber's parents took her to Children's Hospital in Pittsburgh to be examined by Irene Kershaw, the hospital's chief occupational therapist. Ms. Kershaw subsequently recommended an occupational therapy program for Amber. It included encouraging her to stand to perform classroom activities and to ambulate using crutches. It also included instruction and supervision in self-catheterization.

Defendants object strenuously to characterizing catheterization as occupational therapy, labeling "ridiculous" the notion "that voiding of the bladder constitutes an occupational skill." We think defendants demonstrate an insensitivity to the special problems of the handicapped. Obviously, it is more typical to think of an occupational skill as the ability to type or to drive a truck or to draft a complaint. But surely, if we look closer, behind these very specialized skills is a broad range of every day skills, equally as important to success on the job, such as the

ability to move from place to place, to communicate in one way or another, and to attend to our personal body needs, including voiding of the bladder. It is difficult to imagine an employer hiring an individual who could not attend to his own body functioning.

The implementing regulations support this analysis, defining occupational therapy as ". . . improving, developing or restoring functions impaired or lost through illness, injury or deprivation." Amber Tokarcik has lost through illness a normal bodily function. If she ever hopes to enter this nation's workforce, she must learn to compensate for that loss. Teaching her to compensate—that is, teaching her self-catheterization—is occupational therapy.

Assuming Amber is, at this time, too young to be taught self-catheterization, or assuming the worst, that she might never be able to be taught it, we also find catheterization to be a school health service. Dr. Lynch testified at the administrative hearing that she would consider catheterization to be a health service, to be provided by a health professional or someone trained by a health professional. Given the purpose of catheterization, we hardly need Dr. Lynch's testimony to convince us. Catheterization enables Amber to live, and done as it has been done since 1966, it enables her to live a normal life span.

The Fifth Circuit in *Tatro* likewise found catheterization to be a health service, and thus a supportive service. They concluded: "Quite simply put, without the provision of [catheterization], Amber cannot benefit from the special education to which she is entitled, for without [catheterization], she cannot be present in the classroom at all. Thus, [catheterization] is a supportive service required to

assist Amber to benefit from her special education." Slip op., at 9097.

The concern of the defendants in this case, as well as the concern of the trial court which the Fifth Circuit overruled in *Tatro,* is to establish realistic limits to the requirements of the Handicapped Children Act. We are sympathetic to this concern. But wherever these limits may be found, they are surely not to be set to exclude a service which can require no more than a few minutes a day, and either no expenditure of funds, if performed by the school nurse already required to be on the staff of every Pennsylvania school district, or very little expenditure of funds, if performed by a part-time nurse's aide.

Furthermore, while it may not do so in some areas, the Act itself sets practical and realistic limits in the area of health services. The health services required are those which can be provided by a nurse or other quaified individual, and not those which require a doctor to perform. And if Dr. Lynch's testimony is credited, school nurses are charged by Pennsylvania law with performing all the normal functions of a nurse; including, as school nurses in other districts do, caring for braces, attending to colostomies and catheterization.

Finally, we agree with the Fifth Circuit in *Tatro* that any other decision in this case would violate the Congressional mandate that, whenever possible, handicapped children be educated with non-handicapped children:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the fol owing conditions are met:

> (5) The State has established . . . procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . 20 U.S.C., Section 1412 (5).

Fortunately for Amber Tokarcik, her mother has been able, throughout the first four years of her education, to come daily to the school and tend to her unique needs. If she had not been able to do so, Amber would have probably received instruction at home, a course of action which, incidentally, would surely be greatly more expensive than providing an aide to catheterize Amber at school. The Fifth Circuit in *Tatro* ruled such an exclusion to be in violation of the Rehabilitation Act of 1973, 29 U.S.C., Section 794, prohibiting discrimination against the handicapped in any program receiving federal funds. The Court in *Hairston v. Drosick,* 423 F. Supp. 180 (S.D. W. Va. 1976), ruled the same when presented with the same facts.

We cannot believe that Congress intended for a child who is perfectly able to benefit from every aspect of a normal education to be excluded from the classroom because of a problem as easily solved as this one. The concept of mainstreaming has admittedly come under criticism recently. *See Enforcing the Right to an "Appro-*

priate" Education: The Education for All Handicapped Children Act, 92 Harv. 1103. But the critics concentrate on the heavy burden placed on the classroom teacher by the presence of a sometimes disruptive handicapped child who requires extraordinary attention and care. Amber Tokarcik places absolutely no burden on her teacher whatsoever. In every way but one, she functions as a perfectly normal child. Even the most vociferous of the critics of mainstreaming could not possibly object to Amber remaining in the classroom.

Finally, we rely on the emphasis in the Handicapped Children Act on the "unique needs" of the handicapped child. The Third Circuit in *Battle* determined that even a policy with as many cost implications as the policy limiting a school year to 180 days of instruction could not be applied across-the-board to all handicapped children. If a particular child requires more than 180 days of instruction then the Act requires that he receive it. The plain words of the Act make clear that simply opening the school house doors and inviting the handicapped in will not satisfy the Congressional mandate. This is essentially what Forest Hills School District has offered Amber Tokarcik. It is simply not enough.

An appropriate Order will be issued.

(s) ALAN N. BLOCH
United States District Judge

Date: 10/31/80

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-338

AMBER TOKARCIK, a minor, et al.,
Plaintiffs

vs.

FOREST HILLS SCHOOL DISTRICT, et al.,
Defendants

ORDER

AND NOW, this 31st day of October, 1980, upon consideration of Plaintiffs' Motion for Summary Judgment and all Defendants' Motions for Summary Judgment,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED. IT IS FURTHER ORDERED that all Defendants' Motions for Summary Judgment are DENIED; to wit:

Defendants are directed to provide clean intermittent catheterization services for Amber Tokarcik during school hours for so long as she remains a student in the Forest Hills School District's free public education program and is in need of such services.

Defendants are Ordered to bear the costs of this action.

Plaintiffs are directed to file a brief in support of their request for damages and attorney's fees within ten (10) days. Defendants are to respond to this brief ten (10) days thereafter.

(s) Alan N. Bloch
United States District Judge

cc: Edward R. Schellhamer, Esquire
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2844/80-2845

AMBER TOKARCIK, a minor by Nileleen N. Tokarcik, her parent and natural guardian, and MICHAEL G. TOKARCIK, and NILELEEN N. TOKARCIK

vs.

FOREST HILLS SCHOOL DISTRICT, ROBERT L. BEYER, Secretary, and DR. WARREN E. HOWARD, individually and as Supt. of Forest Hills School District and PENNSYLVANIA DEPARTMENT OF EDUCATION, DR. ROBERT SCANLON, Secretary of Education of the Commonwealth of Pa.

Forest Hills School District, Robert L. Beyer and Robert Anderson,
Appellants in No. 80-2844

Pennsylvania Department of Education and Robert G. Scanlon, Secretary of Education,
Appellants in No. 80-2845

(D. C. Civil No. 79-0338)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on May 18, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 31, 1980, be, and the same is hereby affirmed. Costs taxed against appellant.

Attest:

Chief Deputy Clerk

September 8, 1981

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 80-2844/2845

AMBER TOKARCIK, a minor by Nileleen N. Tokarcik, her parent and natural guardian, and MICHAEL G. TOKARCIK, and NILELEEN N. TOKARCIK,
Appellees

vs.

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Argued May 18, 1981

Before: Adams, Rosenn and Higginbotham,
Circuit Judges

(Filed September 8, 1981)

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Robert G. Scanlon

OPINION OF THE COURT

ADAMS, *Circuit Judge*

We are once again asked to define the rights of handicapped school children and the obligations of school districts, as well as the roles of courts and agencies, under the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* [hereinafter EAHCA].[1] First, however, it is necessary to decide if an appealable order exists. If so, we must ascertain whether the plaintiffs' claim is timely filed. Once these threshold requirements are satisfied, we are required to determine whether clean intermittent catheterization falls within the statutory definition of "related services" that a school district must provide a handicapped child.

I.

Plaintiff-appellee, Amber Tokarcik, is currently a fourth-grade student in the Forest Hills School District in Cambria County. She was born with spina-bifida, a congenital physical defect, and is paralyzed from the waist down. Because Amber's condition prevents her from emptying her bladder voluntarily, intermittent catheterization is necessary approximately every four hours. In 1976, when Amber entered kindergarten in the regular public school program, her parents, also appellees in this suit, re-

[1] In two earlier cases, we held that a profoundly retarded child had a right to residential placement under the EAHCA, *see* Kruelle v. New Castle County School District, Nos. 80-1875, 80-1876, 80-2063, 80-2064 (3d Cir., April 1, 1981), and that the 180 school-day rule applicable to nonhandicapped children was inappropriate for the unique needs of the handicapped. *See* Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied* 49 U.S.L.W. 3954 (U.S. June 22, 1981).

quested the school personnel to perform the necessary catheterization once a day. The Forest Hills School District refused to provide the service. Consequently, some member of Amber's family has gone to the school each day to catheterize. Amber has no mental deficiencies and her educational performance is normal for a child her age.

Prior to the 1977-78 school year, Amber's parents and the school staff attempted to agree upon an appropriate individualized educational program (IEP) for Amber in conformity with the EAHCA, see 20 U.S.C. §1401 (19). Consensus appears to have been reached concerning special transportation to and from school, and an adaptive physical education program. But the continuing impasse over the provision of the clean intermittent catheterization (CIC) services led Amber's parents to request a due process hearing, as provided in the Act. 20 U.S.C. §1415 (b) (2). At the hearing, the school district contended that Pennsylvania law does not require school nurses to catheterize students. Thus, unless a member of Amber's family came to the school to perform the CIC, the district would have to provide Amber with a "special educational placement," 20 U.S.C. §1401 (16), most likely at her home with a tutor. In contrast, Amber's parents presented the testimony of Dr. Lynch, Director of the Bureau of Children's Services in the Pennsylvania Department of Health, who maintained that catheterization is no longer considered a surgical procedure and that the general duties of school nurses would include CIC. The local hearing examiner declared that the school district was not legally required to perform the catheterization services. On appeal, Dr. Kline, then Secretary of Education, upheld the findings and opinion of the local examiner in a decision dated December 22, 1978.

Having exhausted their administrative remedies, the Tokarciks brought suit in the district court against the Forest Hills School District, its secretary and superintendent, the Pennsylvania Department of Education and its Secretary, Dr. Scanlon [hereinafter collectively appellants or school authorities], alleging violations of 42 U.S.C. §1983, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the EAHCA, 20 U.S.C. §1401 *et seq.* They requested provision of catheterization for Amber and compensatory and punitive damages. In a memorandum opinion and order of May 19, 1980, the district judge dismissed the §1983 and Rehabilitation Act claims against the Department of Education as well as the §1983 damages claim against Secretary Scanlon. No appeal was taken from that order, and the parties proceeded with cross motions for summary judgment on the EAHCA claims.[2]

The trial judge, relying exclusively on the administrative record and an additional set of stipulations, granted plaintiffs' motion for summary judgment. The court directed the school authorities to provide CIC services for Amber as long as she remains a student in the Forest Hills

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[2] The district court opinion of May 19, 1980 held that although a private cause of action existed under the Rehabilitation Act, the action against the State Department of Education was barred by the Eleventh Amendment. It also dismissed the §1983 cause of action against the Department because the Department was not a person within the meaning of 42 U.S.C. §1983. Further, it held that to the extent the complaint seeks damages from Secretary of Education Scanlon without any allegations of his personal involvement, it must be dismissed. App. 38-42. These claims are not presently before us and we express no opinion regarding their merits.

district and is in need of such services. In reaching this result, the district court first held that the court action contemplated by the EAHCA was clearly in the nature of a *de novo* proceeding and not an appeal from an agency decision. Although the complaint had not been filed within the 30 day statutory limit for appeals from administrative determinations, the district court considered that the suit was nevertheless timely under either the two-year or six-year limitations statutes which govern virtually all actions in Pennsylvania.

On the merits, the district judge believed that *Tatro v. State of Texas,* 625 F.2d 557 (5th Cir. 1980), controlled the present case. Crediting the Tokarcik's expert Dr. Lynch, who testified that school nurses were qualified to perform catheterization, the court concluded that the provision of CIC would require only a few minutes a day and at most a minimal expenditure of funds. Further, the alternatives to providing CIC—either placement in a special class for the handicapped or at-home instruction—were much more expensive and would violate the mainstreaming principles embodied in the EAHCA.[8] The court thus held that CIC fell within the meaning of a "related service," under the Act, specifically either a "supportive service," as defined in §1401(17), or a "school health service," as explained in 34 C.F.R. 300.13(a). The

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[8] Mainstreaming is the congressionally-approved policy of educating the handicapped, to the maximum extent appropriate, with their nonhandicapped peers. If placement in a regular classroom proves infeasible, the "least restrictive environment" concept governs implementation of the congressional goal of providing the handicapped an equal educational opportunity. *See* S. Rep. No. 94-168, 94th Cong., 1st Sess. *reprinted in* [1975] U.S. Code Cong. & Ad. News 1430, 1432, 14 7.

trial judge reserved the question of damages and attorney's fees for a later date, and directed further briefing on those aspects of the case by the parties. We affirm.

II.

Before reaching the merits of the case, two hurdles to our ability to hear the present appeal must be surmounted. First, does a final order exist and, if not, is there an interlocutory order over which we can exercise jurisdiction? Both parties initially maintained that the district court's decision of October 31, 1980 was a final order, appealable under 28 U.S.C. §1291. Scrutiny of the record, however, reveals that the district court directed the appellants to provide Amber Tokarcik with CIC but did not rule on plaintiffs' claims for damages and attorney's fees. App. 52. Thus, the decision of the district court did not dispose of the entire case, and consequently the judgment was not final within the meaning of §1291. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976) (a grant of partial summary judgment limited to the issue of liability is by its terms interlocutory and not final within the meaning of §1291); *Fireman's Fund Insurance Co. v. Joseph J. Biafore, Inc.*, 526 F.2d 170 (3d Cir. 1975) (district court order which did not resolve damages claim not appealable under 28 U.S.C. §1291).

Although litigation with respect to the entire judicial unit has not terminated, Congress, since 1891, has excepted from the finality rule a group of interlocutory orders of an equitable nature. Now codified at 28 U.S.C. §1292(a), subsection (1) permits appeal from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to modify or dissolve injunctions. . . ." Because the district court in partially granting plain-

tiffs' motion for summary judgment, ordered the school district to provide CIC for the duration of Amber's special education program, we hold that we have appellate jurisdiction to review this interlocutory decision under 28 U.S.C. §1292(a)(1). An injunction that does not cover all the legal relief a plaintiff seeks is nevertheless a coercive order from which Congress has granted litigants a right to immediate appellate review. *See N.L.R.B. v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 104 (3d Cir. 1979).

Recently, the Supreme Court reiterated that "we have construed the statute narrowly to ensure that appeal as of right under §1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permitting litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence.'" *See Carson v. American Brands, Inc.*, 49 U.S.L.W. 4171, 4173 (U.S. Feb. 25, 1981) *quoting Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). Yet this language neither alters the congressional directive and policy nor undermines the result we reach here. *Carson* itself held that an interlocutory order of a district court denying a joint motion by parties in a Title VII suit to enter a consent decree containing injunctive relief was an appealable order. In requiring that a litigant demonstrate that an interlocutory order might have a "serious, perhaps irreparable, consequence" and could be challenged only by immediate appeal, the Supreme Court did not cut back the statutory scope of §1292(a)(1). Rather, the Court sought to distinguish pretrial procedural orders that had the practical effect of refusing an injunction and could be effectually challenged only at that moment, from procedural orders that did not pose irreparable consequences and could be effectively reviewed on appeal

from final judgment. *Compare Carson, supra* (refusal to enter consent decree containing injunctive relief appealable under §1292(a) (1)) *with Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966) (denial of motion for summary judgment requesting permanent but no preliminary injunctive relief not appealable under §1292). When interlocutory orders do not irrevocably affect the merits of the controversy, the Court, in fear of bringing a flood of pretrial orders within the §1292 exception, has been reluctant to compromise the congressional policy against piecemeal appeals. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978) (order denying class certification held not appealable under §1292).

Notwithstanding the *Carson* qualification that interlocutory orders pose "serious perhaps irreparable consequences," the appealability of a routine interlocutory injunctive order remains unquestioned.[4] Here, the district court directed straightforward injunctive relief which went to the merits of the dispute. And defendants claim irreparable harm insofar as this additional responsibility to furnish what they regard as medical services will diminish their ability to fulfill what is more appropriately within their domain and expertise—the education needs of handicapped children. Consequently, appellate jurisdiction in conformity with 28 U.S.C. §1292(a) (1) exists.

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[4] Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955), explained the judicial interpretation of §1292 as follows:

> The appealability of routine interlocutory injunctive orders raised few questions. (cite) There the statute was clear. It was when stays of proceedings, in distinction to injunctions, were appealed that the issue of jurisdiction became sharp.

348 U.S. at 182. *Carson* relied on, rather than overruled *Bodinger*.

III.

Appellants interpose a second obstacle, a statute of limitations defense, to our consideration of the merits of the dispute. The school authorities contend that the district court erred in applying either a two-year or six-year statute of limitations period to the plaintiff's judicial cause of action under the EAHCA. They argue that under the Act aggrieved parties can seek judicial redress only from decisions of a state educational agency.[5] 20 U.S.C. §1415(e). Accordingly, appellants claim that the plaintiffs' action can be construed in only two ways: as an appeal from an administrative determination or as an appellate action "in the nature of a *de novo* proceeding." In either case, the school authorities maintain, the relevant state limitations period, which should likewise apply in federal court, is 30 days. *See* 42 Pa. Cons. Stat. Ann. §5571(b) (Purdon Supp. 1981); *cf.* 47 Pa. Stat. Ann., §4-464 (Purdon Supp. 1980-81); 75 Pa. Stat. Ann., §1550(a) (Purdon Supp. 1981); 42 Pa. Cons. Stat. Ann., §5105 (Purdon Supp. 1981). Because plaintiffs initiated suit in the district court on March 14, 1979, nearly 90 days after Secretary Kline issued the order that they chal-

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[5] There is of course no need to exhaust administrative remedies provided in the Education Act where it would be a futile gesture, *see* Armstrong v. Kline, 476 F. Supp. 583, 587 (E.D. Pa. 1979) *remanded on other grounds*, Battle v. Com. of Pa., 629 F.2d 269 (3d Cir. 1980); Loughran v. Flanders, 470 F. Supp. 110, 112 (D. Ct. 1979), or where the administrative remedies available do not provide plaintiffs with an adequate forum for securing redress of their grievances. *See* Monahan v. State of Nebraska, 645 F.2d 592, 597 (8th Cir. 1981); Riley v. Ambach, No. 79-2783 (S.D.N.Y. filed June 30, 1980), *rev'd* No. 80-7600 (2d Cir., May 19, 1981) (disagreeing with district court that exhaustion in this instance would inevitably prove futile).

lenge, the appellants claim that the action is barred as untimely filed.

No general statute of limitations governs litigation in federal courts. Moreover, Congress, in creating a federal right, often does not provide a time limit for enforcement of that right. The limitations period for commencing actions under federal legislation has consequently been left largely to judicial implication. From early on it was assumed that in the absence of an explicit congressional declaration, the Rules of Decision Act[6] mandated the application of the statute of limitations of the forum state. *See McCluny v. Silliman,* 28 U.S. (3 Pet.) 270 (1830); *Campbell v. Haverhill,* 155 U.S. 610 (1895). To effectuate the presumed congressional intent "that the remedy [for federal rights] should be enforced in the manner common to like actions within the same jurisdiction." 155 U.S. at 616, federal courts were required to characterize the essential nature of the federal claim in terms of the format which the various state statutes of limitations establish. *See Davis v. United States Steel Supply, Etc.,* 581 F.2d 335, 337 (3d Cir. 1978); *Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (en banc). But resort to state statutes was not to be mechanical, in disregard of the impact of local laws on federal objectives.

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[6] The Rules of Decision Act, part of the Judiciary Act of 1789 states:

> [T]he laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

Rev. Stat. §721 (1875). Later amended and codified at 28 U.S.C. §1652 (1952).

In the words of Justice Frankfurter, "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

The present case involves such a federally-created right accompanied by congressional silence regarding the limitations period. Nor does the legislative history evince any specific consideration of a time period for filing a civil action under 20 U.S.C. §1415(e)(2). *See* S. Rep. No. 94-455 (Conference Committee) 94th Cong., 1st. Sess. 50, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503.[7] Further, it is difficult to find a state analogue which would enable the Court to characterize the nature of the federal claim. The statute speaks of "the right to bring a civil action with respect to the complaint presented pursuant to this section." 20 U.S.C. §1415(e)(2). The legislative history specifically indicates that the House Bill's provision for *appeals* from the determinations of the state educational agency was dropped and replaced with a conference substitute creating a right to bring a civil action—the present statutory language. *See* 121 Cong. Rec. 36635-36 (1975) (Joint Explanatory Statement of the Committee of Conference). In addition, the EAHCA provides that district courts shall have juris-

[7] The dissent seeks to construct a congressional intent by piecing together a few fragments of sentences and clauses from statements of congressmen dealing with the EAHCA legislation. However, the Supreme Court, in Consumer Products Safety Commission v. GTE Sylvania, 100 S. Ct. 2051, at 2061 (1980), recently warned against undue reliance on such a technique.

diction of such actions without regard to the amount in controversy, 1415(e)(4), and shall grant such relief as the court determines is appropriate. 20 U.S.C. §1415 (e)(2) and (4).

Nothwithstanding similarities between this federal right and a cause of action under, for example, 42 U.S.C. §1983, the Education Act also requires exhaustion of state agency proceedings. *See* 20 U.S.C. §1415(e)(2); *Riley v. Ambach*, No. 80-7600 (2d Cir., May 19, 1981). Although parties may supplement the administrative record and the court is to make an independent decision based on the preponderance of the evidence, the exhaustion criterion arguably lends to the proceedings the character of a de novo appeal rather than an original action. Yet the existence of state administrative machinery need not deprive a later federal court action of its independent nature. Both Title VI and the Rehabilitation Act, whose protection significantly overlaps with that of the EAHCA, embody statutory schemes which require exhaustion of administrative remedies. *See* 45 C.F.R. §§80.6-80.10. The implied causes of action which courts have recognized under those statutes, however, have not been characterized as appellate in nature.[8]

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[8] All circuits that have ruled on the issue have found a private right of action to enforce the provisions of Section 504 of the Rehabilitation Act of 1973. *See* Camenisch v. Univ. of Texas, 616 F.2d 127, 131 (5th Cir. 1980) (en banc); *vacated and remanded on other grounds*, 49 U.S.L.W. 4468 (U.S. April 29, 1981); NAACP v. The Medical Center, Inc., 599 F.2d 1247, 1258-59 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977) (per curiam); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v.

NOTE — *(Continued)*

Moreover, the allegedly controlling state statutes of limitations which appellants seek to rely upon are lacking in a critical dimension—they govern appeals from *state* administrative agencies to state courts and do not purport to apply to separate actions brought in the *federal* system. Past cases dealing with the appropriation of state limitations periods for federally created rights have not usually involved procedural schemes requiring exhaustion of state administrative remedies.[9] Thus, little attention has been given the need to accommodate a transfer from the state to the federal system. While Pennsylvania state courts have denominated, without further discussion, actions brought in their forums under 20 U.S.C. §1415(e)(2) as appeals from agency decisions, they have not explicitly specified the limitation on the appeal period. *See Shanberg v. Commonwealth,* Pa. Comwlth. Ct. , 426 A.2d 232 (1981); *Krawitz v. Commonwealth,* 48 Pa. Comwlth. Ct. 155, 408 A.2d 1202 (1979). Even assuming

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NOTE — *(Continued)*

Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977). The Supreme Court has carefully declined to address the question. *See* University of Texas v. Camenisch, No. 80-317, 49 U.S.L.W. 4468 (U.S. April 29, 1981) (vacating and remanding to district court for further proceedings); Southeastern Community College v. Davis, 442 U.S. 397, 405 n. 5 (1979). As for Title VI, Lau v. Nichols, 414 U.S. 563 (1974) has been construed to support the existence of such a right.

[9] *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (violation of collective bargaining agreement under Taft Hartley Act); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (equity action under Federal Farm Loan Act); O'Sullivan v. Felix, 233 U.S. 318 (1914) (civil rights action under 42 U.S.C. §1985); Campbell v. Haverhill, 155 U.S. 610 (1895) (patent infringement).

that such claims asserted in state courts have been regarded as appeals to be made within 30 days, it is not at all evident that actions brought in *federal* court should be governed by time periods deemed appropriate for appeals in the unitary state system. At a more fundamental level, when dealing with a federally created right, it is the federal courts which must decide which state limitation statute provides the proper referent. Ultimately, we must be guided by the aim of the federal statute in devising the limitation period in issue here. If state limitations law conflicts with federal procedural safeguards embodied in the Education Act, the federal concerns are paramount. *Cf. Vogel v. School Board of Montrose R-14 School Dist.*, 491 F. Supp. 989, 993 (W.D. Mo. 1980) (whenever conflict exists between procedural safeguards mandated by 20 U.S.C. §1415 and state law, the applicable federal law is controlling).

Apparently, only one other court has undertaken to define the statute of limitations for the federal cause of action at issue here. In *Monahan v. State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part, rev'd and remanded in part on other grounds*, 645 F.2d 592 (8th Cir. 1981), the school district argued that a state statute requiring persons to file for judicial review of orders of the state commissioner of education within 30 days, should likewise control federal claims brought under the Education for All Handicapped Children Act, 20 U.S.C. §1415(e)(2). The court, however, cautioned that once a state cause of action similar to the federal claim is found to exist, a court must examine whether the nature of the proceedings provided under the respective state and federal causes of action are equivalent. There, substantial disparities existed between the state and federal schemes.

The state procedure involved restricted court review, limited factually to the administrative record, and limited legally to an arbitrary and capricious scope of review. In contrast, under the federal statute, parties could adduce new evidence and the reviewing court was not bound under a clearly erroneous standard to the determination of the state agency, 20 U.S.C. §1415(e)(2). Such differences indicated that the policy considerations relevant to setting the limitation period for the state suit had no necessary application to the federal cause of action. As a result, the court believed that the 30 day state limitations period would not fully effectuate the federal policies underlying the EAHCA, and concluded that the plaintiff's claim was not time barred. 491 F. Supp. at 1084-85.

We find the reasoning of the *Monahan* court persuasive. Admittedly, the EAHCA is an integrated federal and state statutory scheme, and deference to state plans and procedures is often warranted. *See* 20 U.S.C. §1412; *Kruelle v. New Castle County School District,* Nos. 80-1875, 80-1876, 80-2063, 80-2064 (3d Cir., April 1, 1981); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 Harv. L. Rev. 1103 (1979). But the procedural protections embodied in the Act indicate that adoption of a 30 day state appeals statute to govern the filing of an federal cause of action in a federal district court, the situation here, would be inappropriate. In explicitly providing in §1415(e)(2) that any aggrieved party has a right to bring a *civil action* in which the reviewing court may hear evidence not contained in the administrative record and must reach an independent decision based on a preponderance of the evidence, Congress clearly contemplated more than the customary appeal from an administrative

decision.[10] Moreover, the statute permits a court to "grant such relief as the court determines is appropriate," a far broader remedial power than is customarily conferred on judicial bodies reviewing agency decisions. 20 U.S.C. §1415(e)(2). Precisely because a judicial suit under the Education Act is practically indistinguishable from the usual civil action in which issues are tried *de novo*, the state limitations statute controlling administrative appeals to state courts that appellants urge us to adopt is neither an analogous nor appropriate reference point.[11] *Cf. Lad-*

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[10] *See* Ladson v. Board of Education of the Dist. of Columbia Gov't., 3 Educ. Handicapped Law Report [hereinafter BHLR] 551:188 (D.D.C. March 12, 1979); Rowley v. Board of Ed. of Hendrick Hudson Central School Dist., 632 F.2d 945, 948 n. 5 (2d Cir. 1980); S. Rep. No. 455 (Conf. Rep.) 94th Cong., 1st Sess. 50, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503.

[11] Appellants actually recommend several state statutes as appropriate analogues. *See supra* at 6-7. Because all involve appeals periods of 30 days or less, we will treat them as a unit and refer to the general statute governing appeals from state agencies, Pa. C.S. 2 §701 subchap. A, for illustrative purposes. While a few of these statutes provide for de novo review and therefore approach the extent of judicial review contemplated in 20 U.S.C. §1415, there are nevertheless significant distinctions. Thus, 47 Pa. Stat. Ann. §4-464, which covers liquor license proceedings, is limited to questions of license refusals or renewals, although federal courts under §1415 can reach issues the state agencies had no authority to address. *See* Hark v. School District of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980). Further, 47 Pa. Stat. Ann. §4-464 confines the court to sustaining or overruling the agency decision, whereas under §1415 the court is to sculpt the relief it deems appropriate in light of the goals of the Education Act. Only 75 Pa. Cons. Stat. Ann. §1550 (Purdon Supp. 1981-82), which applies to driver's license suspensions,

NOTE — *(Continued)*

son v. Board of Education of the Dist. of Columbia Gov't., 3 Educ. Handicapped Law Report, [hereinafter EHLR] 551:188, 189 n. 4; *Monahan, supra*, 491 F. Supp. at 1084. Significantly, in confining the appeals period to 30 days, the suggested state statute would undercut in several respects the substantive and procedural protections the Congress intended to supply when enacting the federal law.

First, as the court in *Monahan* explained, when judicial review is limited to examination of the administrative record—as it is in the state statute invoked here[12]—a plaintiff can adequately prepare his case within 30 days. No investigation into evidence outside the administrative proceedings is necessary or indeed permitted. *See Monahan, supra* at 1085. Because Section 1415(e)(2) allows

NOTE — *(Continued)*

appears to grant an analogously broad scope of de novo review. Of course, parties involved in such appeals do not have to adapt to a federal system after having dealt with a state system, and the issues and evidence involved may be much less complex.

[12] *See* Pa. C.S. 2 §701 Subchapter A. Judicial Review of Commonwealth Agency Act. Section 704, "Disposition of appeal" reads:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellants or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. §706 (relating to disposition of appeals).

the presentation of additional evidence, different time considerations, accommodating the needs of parties to investigate and prepare, govern the limitations period for an action brought under the federal education statute.[13] In a recent EAHCA case before this Court the parent's principal witness in district court was a consultant for the school district who had not previously testified. While the state reviewing officer had denied the parent's request to reopen the record to permit the expert's testimony, the district judge relied extensively on this additional evidence in reaching his decision. *See Kruelle v. New Castle County School District, supra* at 6.

Second, in providing for independent court review, Congress apparently intended to create an external check to guard against possible procedural deficiencies or institutional pressures inherent in the educational administrative system.[14] Rather than affirming, reversing or remanding an agency decision, courts are required to decide upon an educational placement which conforms to their understand-

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[13] Admittedly, the plaintiffs here did not find it necessary to adumbrate the record for purposes of appeal. *See* appellants brief at 12. But the specific facts of this case should not detract from the desirability of defining a single limitations period which acknowledges the needs of parties who do investigate and present new evidence in conformity with 20 U.S.C. §1415(e)(2).

[14] The intial bill passed by the House contained the more conventional provision that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence. . . ." H.R. 7217, 94th Cong., 1st Sess., *reprinted in* H.R. Rep. No. 332, 94th Cong., 1st Sess. 56 (1975) *and* U.S. Code Cong. & Ad. News, 1480, 1501. Presumably, a desire to expand the role of the reviewing court accounts for the statutory standard which Congress ultimately prescribed: proof by a preponderance of the evidence.

ing of the aims and terms of the Education Act. *Anderson v. Thompson,* 495 F. Supp. 1256, 1260-61 (E.D. Wis. 1980) (role intended for court in reviewing state administrative decision is to exercise independent judgment in arriving at an appropriate placement). A limited appeals period which functions to restrict the range of evidence and issues that reviewing courts could consider would effectively dilute the independent position of the district courts envisaged by Congress. Indeed, the statutory language of Section 1415(e)(2), which permits federal or state litigation by those "aggrieved by the findings and decision" in the state administrative procedure, encompasses by its very language more than assignments of error to the findings of fact or conclusions of law made by hearing officers. As one court has aptly noted:

> One may be as aggrieved by a correct interpretation of extant law or administrative authority as by unsupported findings of fact or erroneous legal analysis. It would be anomalous if, under a federal statute which contemplated recourse to the federal courts to examine state administrative decisions alleged not to fulfill the promise of a federally funded program, a deficient state administrative procedure could preclude review, especially when the gravamen of the complaint is precisely that deficiency.

Hark v. School Dist. of Philadelphia, 505 F. Supp. 727, 730-31 (E.D. Pa. 1980).

In *Hark,* the parents placed their child in an out-of-state school, which the state hearing procedure later determined to be appropriate. Although the question of reimbursement was raised by the parents, the matter was never conclusively resolved. The parents, believing they had

received a favorable ruling from the hearing officer, did not appeal to the Secretary of Education or the courts. Only when attempts to secure reimbursement failed, and the state indicated that no reimbursement procedure existed, did the parents later bring suit—210 days after the final decision by the hearing officer. The court, reasoning that the parents neither assigned error to the rulings in the administrative proceedings nor appealed from the findings, concluded that "section 1415(e)(2) not only provides for a kind of appellate jurisdiction, but also for review whenever the plaintiff, having exhausted all applicable administrative remedies, remains 'aggrieved.'" *Id.* at 731. As *Hark* illustrates, the court's duty to insure that the state's due process mechanism is fulfilling the Act's guarantee of a free appropriate education would be ill-served by a 30 day appeal period. Frequently, systemic deficiencies or placement problems will surface only with the passage of time.[15]

Third, the thirty day limitation period which appellants insist is controlling here would frustrate the statutory policy of cooperative parental and school involvement in placement determinations. One of the Act's important goals, which the procedural safeguards are designed to enhance, is to prevent inappropriate educational place-

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[15] The prophylactic role envisaged for the courts is buttressed by the legislative history. Senator Williams, the principal author of the bill stated:

> I want to underscore that exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter.

121 Cong. Rec. 37416 (1975) (Senate conference report).

ments arising from erroneous evaluations of a child's particular needs. *See Monahan, supra* at 1085; *Lora v. Board of Education of City of New York,* 456 F. Supp. 1211, 1227 (E.D.N.Y. 170) *aff'd in part and vac. and remanded in part,* 623 F.2d 248 (2d Cir. 1980). This purpose would not be furthered if parents were given only thirty days within which to evaluate and appeal the state secretary's decision. Moreover, the parental complaint mechanism set forth in the statutes intentionally contemplates the enforcement of the statutory rights provided by lay persons who are peculiarly subject to being unfairly penalized by a brief 30 day time bar.[16]

Much like *Hark,* the case of *Pratt v. Board of Education of Frederick City,* 501 F. Supp. 232 (D. Md. 1980), highlights the need for an approach more flexible than that resulting from a 30 day appeal period. In *Pratt,* the child's mother and school authorities assented to the State Hearing Review Board's determination of an appropriate individualized educational program (IEP). No appeal was taken to any court. Then, during the summer, as individual provisions of the IEP were being hammered out, the parties reached an impasse as a result of a ruling on disciplinary provisions by the school board. Only at

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[16] Pennsylvania has recognized the desirability of parental participation and has adopted procedures to minimize the dificulties faced by parents pursuing remedies through the complaint mechanism. *See* 22 Pa. Code §13.32(1)(i) (notice to parent of availability of Penn. Association for Retarded Citizens and other organizations to assist in the due process hearing); 22 Pa. Code §13.32(11) (hearing to be held at place convenient for parent). *See also* Lora v. Board of Educ., *supra,* 456 F. Supp. at 1241 (New York City bars school attorneys from participating in administrative hearings if parents are not represented by counsel).

that point did the mother institute suit in the federal court. Had the claim been regarded as an appeal, the child would have effectively been denied the right to an appropriate educational program; but the court accorded no significance to the delay between the initial agency decision and the court action. Rather, maintaining that the case arose under either the Education Act, 20 U.S.C. §1401 *et seq.*, or the Rehabilitation Act, 29 U.S.C. §794, the court premised jurisdiction on 28 U.S.C. §1331(a). The judge stated that jurisdiction "may also exist pursuant to 20 U.S.C. . . . §1415(e)(2)," *id.* at 234, but found it unnecessary to rely on that jurisdictional base. Yet, the possibility of federal question jurisdiction in *Pratt* or, as suggested in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the availability of §1983 actions based on the Education Act, with jurisdictional footing under 28 U.S.C. §1343(3), argues against construing the term "civil action" in Section 1415(e)(2) as a simple appeal.[17]

While the dissent maintains that enforcing expeditiousness by a 30 day appeal period would best serve the child's educational needs, the consequences of such a rule render the expressed solicitude somewhat questionable. Few would doubt that most parents desire a prompt resolution of their child's educational placement. It is

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[17] In the present case plaintiffs pleaded violations of 42 U.S.C. §1983, the Rehabilitation Act of 1973, 29 U.S.C. §794 and the EAHCA. The district judge dismissed the §1983 and Rehabilitation Act claims against the Department of Education as well as that part of plaintiff's complaint against Dr. Scanlon which sought monetary damages. However, it appears that a §1983 claim seeking injunctive relief from Secretary Scanlon is still outstanding. Were we to find the EAHCA cause of action time-barred, the plaintiffs might arguably reassert their claims under §1983.

questionable though, whether barring the courtroom door after 30 days is an effective means of reinforcing this parental concern. The attempt to improve the quality of the delivery of the statutory rights will frequently produce an ironic reversal; denial of the rights altogether. Nor can the desire for promptness remove the realities of long backlogs in the court system. Insofar as proceeding through the judicial system necessarily entails delay, little appears to be gained by forcing parents to forfeit their rights if they overstep the short 30 day appeal period by a few days.

Furthermore, several of the procedural protections embodied in the statute already help to allay the inevitabilities of judicial delay. Undoubtedly, quick decisions and placements which keep pace with a child's changing needs are most desirable. But Section 1415(e)(3), the "stay put" provision—which commands that during the pendency of any proceedings, unless the school authorities and parents agree otherwise, the child shall remain in the current educational placement—at a minimum guarantees that the most recently agreed upon program cover any unresolved interims.[18] Premised on the rationale that preservation of the status quo rather than an inappropriate reaction to an emergent situation provides for the best

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[18] 20 U.S.C. §1415(e)(3) reads:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

interests of the child, this section is clearly designed to minimize the detrimental effect of delay in resolving disputes over educational programs. Thus, the "stay put" provision insures that a school cannot eject a child without complying with due process requirements. *See Stuart v. Nappi,* 443 F. Supp. 1235 (D. Conn. 1978). And it guarantees consistency in a child's learning environment until a challenge to an existing placement has successfully established that a superior alternative exists.[19] By preventing interruption and the concommitant risk of a setback in the child's development, section 1415(e)(3) undercuts the argument for a 30 day appeal period as necessary for the educational well-being of the child. Further, the proviso that courts may entertain additional evidence insures that the most recent educational needs inform the court's final decision. *See Anderson v. Thompson,* 495 F. Supp. 1256, 1261 (E.D. Wis. 1980) (because three years passed between hearing officer's decision and time of trial in federal court, all evidence presented during administrative proceeding and court action must be considered as it bears on child's current education needs).

Inasmuch as observance of a 30 day appeal period at best does little to alter the realities of court backlogs and at worst prevents aggrieved parties from redressing complex or unforeseen problems, the Court is disinclined to adopt such a truncated limitation period. The portion of the legislative history which the dissent invokes to support the desirability of prompt resolution is also tempered by the recognition that quick dispositions be "consistent with

[19] The statute also provides that a child applying for initial admission to public school is entitled to be placed in the regular school program unless the parents and school agree to do otherwise. *See* 20 U.S.C. §1415(e)(3).

fair considerations of the issues involved." 121 Cong. Rec. 37416 (1975) (Report of Committee of Conference) (remarks of Senator Williams.)[20]

While state limitations law is applied insofar as it supplements and fulfills federal policy, it would appear that the 30 day period proposed by appellants is simply incompatible with too many of the objectives of the Education Act. *Cf. UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Post hoc application of this nonobvious time bar would clearly frustrate the federal policy of providing an appropriate education and would work severe hardship to the litigant in the case at hand as well as other young handicapped persons similarly situated.

In dealing with a cause of action arising under federal law, the state statute which is to be borrowed and how it is to be applied are federal law questions, and are determined by federal statutory policy. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *McClaine v. Rankin*, 197 U.S. 154, 162 (1905); *Consolidated Express v. New York Shipping Ass'n*, 602 F.2d 494, 506 (3d Cir. 1979), *vacated and remanded on other grounds* 448 U.S. 901 (1980), *on remand* 641 F.2d 90 (3d Cir. 1981). Because the complaint was filed in the district court ninety days after the decision of the state educational agency, the district court found it unnecessary to decide whether a two-year or six-year statute, which together control

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[20] Significantly, the language in the legislative history addressed to "long and tedious administrative appeals" and the need for promptness in resolving matters, appears in the context of discussions about administrative proceedings. *See* 121 Cong. Rec. 37412, 37416 (Report of Comm. of Conference) (remarks of Sens. Stafford and Williams).

virtually all actions in Pennsylvania, should apply. *See* Memorandum Opinion, App. at 48. For purposes of cases brought in district courts situated in Pennsylvania it would appear that the two-year state statute of limitations, which applies to actions to recover damages for injuries caused by the wrongful act or negligence of another, and controls in medical malpractice cases, is an appropriate referent. *See* 42 Pa. C.S.A. §5524 (Supp. 1981).[21] Moreover, this time period dovetails with Pennsylvania's requirement that a child's educational progress be reviewed at least every two years. *See* 22 Pa. Code §13.31(c).[22] However, for present purposes, we need not decide this question.

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[21] While it might appear desirable to devise a uniform national time limitation to fill the statutory silence of Congress, we decline to engage in judicial legislation at this time. *See* International Union v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (court accepts Indiana's six-year statute of limitations for suit brought under §301 of LMRA to recover vacation pay and refuses to create uniform federal time limitation).

[22] Appellants contend that all actions under 42 Pa. C.S.A. §5524 are for damages in distinction to claims under the Education Act which generally seek prospective relief. Whether Section 1415(e)(2) implies a cause of action for monetary relief is an unresolved question. *Compare* Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979) (court has authority to award damages) *with* Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979) (no money damages). Courts have not hesitated to award compensatory damages for tuition and educational expenses incurred by parents consequent to an inappropriate placement or evaluation by the state educational agencies. *See* Krawitz v. Department of Education, 408 A.2d 1202, 48 Pa. Cmwlth. 155 (1979); Hark v. School Dist. of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980) (permitting action for reimbursement to proceed); Boxall v. Sequoia Union High School Dist., *supra* at 1112-13 (N.D. Cal. 1979) (same).

IV.

Just as congressional silence gave rise to the statute of limitations problem, the absence of clear legislative guidelines similarly accounts for the question whether CIC is a "related service." 20 U.S.C. §1401(17). In place of the nearly inscrutable congressional intent which clouded the limitations issue, however, the statutory language and the general principles informing the Act do offer some guidance as to whether Congress intended CIC to fall within the rubric of "related services."

Under the EAHCA, a child is entitled to a "free appropriate public education" which is comprised of "special education" and "related services" designed to meet the handicapped person's unique needs. *See* 20 U.S.C. §1401(18); *Kruelle v. New Castle County School District, supra* at 9-10. The "special education" component, which deals with the proper environment in which to educate a child, is not ultimately in issue here. *See* 20 U.S.C. §1401(16). Few would dispute that Amber would benefit most from placement in the regular classroom. Rather, the present controversy centers on "related services"—the nature and quality of the services that the school must deliver to Amber. *See* 20 U.S.C. §1401(17).

On the one hand, the Tokarciks contend that Amber is entitled to the CIC service because without it she could not remain and participate in the regular public school program. On the other hand, the school authorities, perhaps with an eye on budgetary and personnel constraints, argue that the CIC is not a "related service," first because it is not connected with a special education program, and second, because it is a medical, not an educational, service. Further, the appellants insist that under Pennsylvania law, school nurses are not required to perform catheterization.

The school authorities have misconstrued the explicit statutory language. Their statutory interpretation reduces the concept of special education to "those areas of educational performance which have been adversely affected by the child's impairment," and simultaneously confines related services to "those services targeted to the special education instructional program and interwined with it." Brief at 30. They then argue that the only special education Amber is receiving is her adaptive physical education, and claim that catheterization is in no way singularly connected to that therapy. The statute, however, is more comprehensive. It states that "special education" means "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, *including classroom instruction. . . .*" 20 U.S.C. §1401 (16).

Because special education specifically contemplates instruction in a regular classroom, related services necessarily include what is required within reason to make such a setting possible for a child who can benefit from it. Since an appropriate education for a physically handicapped child with a normal intellectual capacity aims at promoting achievement roughly equivalent to that of her nonhandicapped peers, special education for Amber should entail classroom instruction, for the nature of her handicap is not so severe as to preclude the possibility of education in a regular environment. *See* 20 U.S.C. §1412(5). Such a placement would demand, in terms of related services, only that the school make the classroom physically accessible to Amber—which it has with the transportation service—and reasonably provide for health needs that might otherwise interfere with classroom performance. This is exactly what the CIC service would accomplish.

In order to avoid this natural statutory inference, appellants have enlisted an overly narrow construction of special education to support an equally constricted view of related services. They maintain that related services encompass only those services directly linked to the effort to educate and exclude any therapeutic services which, while admittedly enhancing a child's education, might also contribute to other than educational needs. Since catheterization would be necessary regardless of whether Amber were in school, such a service, under appellants' analysis, is not mandated by the Act.

Again, the statutory language would appear to foreclose this reasoning. According to §1401(17) related services means:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

A handicapped person undeniably requires or benefits from transportation, supportive services, speech pathology or occupational therapy in many contexts beyond the educational one. Since "related services" need not be education-specific and may often be critical outside the formal educational setting as well, our inquiry narrows to whether CIC is required to assist Amber to benefit from her special education.

In considering whether Congress reasonably could have intended to provide the CIC services needed to render Amber's placement in a regular class "appropriate," we are aided by the regulations which implement section §1401(17) and clarify the definition of "related services." These regulations construe related services to include "school health services," 34 C.F.R. 300.13(a), which are further defined as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.13(b)(10). The district court gave meaning to these general terms by crediting the expert testimony of Dr. Lynch who considered "catheterization to be a health service, to be provided by a health professional." App. 50. In light of the district court's findings that catheterization "can require no more than a few minutes a day, and either no expenditure of funds, if performed by the school nurse already required to be on the staff of every Pennsylvania school district, or very little expenditure of funds, if performed by a part-time nurse's aide," we cannot disagree that CIC properly falls within the definition of "related services" which schools must provide.

Moreover, the regulations themselves place realistic limitations on the nature of the school health services to be provided under the EAHCA. In prescribing that a school nurse be capable of rendering the services, the drastic medical services that only a doctor can perform—and which the school authorities fear they will be asked to furnish in the future—are by definition excluded.

A recent notice issued by the Department of Education reinforces this interpretation of CIC as a "related service." In fact, it explicitly states that Part B of the EAHCA, 20 U.S.C. §§1411 1420, and Section 504 of the

Rehabilitation Act of 1973 mandate public educational agencies to provide CIC as a related service, "when it is required to provide a free appropriate public education, including services in the least restrictive environment." *See* Notice of Interpretation, 34 C.F.R. 104 & 300, 46 Fed. Reg. 4912 (Jan. 19, 1981). Although this interpretation presently carries no binding effect, inasmuch as the newly appointed Secretary of Education, pursuant to an Executive Order, has postponed implementation of all recent regulations pending a review period,[23] the reasoning underlying the interpretation is similar to that employed by the district judge here. Noting that catheterization is not specifically listed as a "related service," but that the list of related services did not purport to be exhaustive, see 34 C.F.R. 300.13, the Secretary of Education concluded that CIC was comprised in the term "school health services." The Secretary explained.

> It is usually a relatively simple procedure to administer with minimal training and can be performed by a school nurse, the individual requiring catheterization, or another responsible person, none of whom need to be licensed to perform the service. Therefore, for the limited purpose of interpreting Part B [of the EAHCA] or Section 504, the Secretary does not interpret CIC to be a medical service.

46 Fed. Reg. 4913 (Jan. 19, 1981).

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[23] *See* 46 Fed. Reg. 12495 (Feb. 17, 1981) (postponement of effective date of interpretation pursuant to Presidential memorandum dated Jan. 29, 1981); 46 Fed. Reg. 25614 (May 8, 1981) (postponement until further notice to permit a comprehensive review of the related services requirements). The latest regulation, however, provides that CIC services be continued during the review period.

The Secretary derived additional support for classifying CIC as a "related service" from the directive contained in §1412(5)(B) of the EAHCA, the mainstreaming provision, which enjoins states to facilitate "education in regular classes with the use of supplementary aids and services" to the greatest exten possible. *See* n. 3, *supra* & n. 24 *infra;* 34 C.F.R. 300.550. Under the Secretary's analysis, CIC was the very sort of "supplementary aid of service" that enables the satisfactory achievement of education in regular classes.

Two recent cases buttress the conclusion that CIC properly falls within the services to be provided under the Act. While reliance on this nascent federal "common law" aids decisionmaking under the Act and helps to eliminate the conscious ambiguity of much of the statutory language, we also recognize the danger of making inappropriate comparisons between the individualized placements and services required by children whose needs, by definition, are unique.[24] Nevertheless, children who require CIC assistance are similarly enough situated for analogies between cases to be relevant and persuasive. That is, most children who currently require CIC have spina bifida, as Amber does. And while not all children with spina bifida (1-2 per thousand births) require CIC, the vast majority are dependent upon it. *See* 46 Fed. Reg. 4913 (Jan. 19, 1981).

In *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980), the Fifth Circuit held that CIC falls within a

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[24] *See, e.g.*, Rowley v. Board of Ed. of Hendrick Hudson Central School Dist., 632 F.2d 945, 948 n. 11 (2d Cir. 1980) (cautioning that the case was unique and not to be cited as authority in any other case).

literal interpretation of related services. Specifically, the court held that if the words "supportive services . . . as may be required to assist a handicapped child to benefit from special education" are read literally, they must include the provision of CIC. "Quite simply put, without the provision of CIC, [the child] cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." 625 F.2d at 562. The court was also confident that the EAHCA contained its own limitations which circumscribed the types of life support systems which must be furnished as related services. Not only must the life support service be one a nurse could administer and be needed for the child to benefit from the prescribed special education, but if it could be performed solely outside school hours, it would not qualify as a related service. *See* 625 F.2d at 563. Although it is questionable whether "related services" *literally* included CIC, since catheterization is never specifically mentioned in the statute or the implementing regulations, *Tatro* certainly supports the proposition that such services can readily be inferred from the statutory text.

Hairston v. Drosick, 423 F. Supp. 180 (D.W. Va. 1976), resolved the same problem in a similar manner under the Rehabilitation Act of 1973. In *Hairston*, the school district was willing to permit a child handicapped by spina bifida to attend the regular classroom only if the mother would perform the needed catheterization. The court held that to condition the child's admission to a normal classroom on the presence of her mother was a violation of the Rehabilitation Act. Although the case was decided before many of the current regulations interpreting the Rehabilitation Act and EAHCA were pub-

lished, its reasoning was not unlike the analysis proffered by the district court here: given the advantages of placement in as normal an environment as possible, to, deny a handicapped child access to a regular public school classroom without a compelling educational justification constitutes discrimination and a denial of statutory benefits. *See* 423 F. Supp. at 184.

Like many cases under the EAHCA, the present conflict arises from the Act's maximum integration or "mainstreaming" requirement[25] and the school's claim that the services required to achieve that goal would cause teachers to neglect the needs of other students and divert funds from special programs most helpful to the handicapped. It should therefore be underscored that providing Amber with CIC will advance the mainstreaming principle embodied in the EAHCA in an extremely cost effective manner without adversely affecting any involved parties.

Indeed, difficult value choices between placing the burden of fiscal limitations on handicapped children as opposed to school districts, or between advantaging a handicapped child by mainstreaming rather than enhancing the education of her nonhandicapped students by exclud-

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[25] This directive is most clearly expressed in 20 U.S.C. §1412 (5)(B) which requires states to establish

> procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, . . .

ing her, do not even confront us. The CIC service has no serious potential for disrupting the education of Amber's nonhandicapped peers. In fact, the district court found that, "Amber Tokarcik places absolutely no burden on her teacher." App. 50. Nor does it pose an undue drain on the school system's financial situation. There are simply no legitimate educational or fiscal grounds for denying Amber a right to participate in the regular classroom setting.[26]

Ultimately, providing Amber with CIC conforms to the goal of self-sufficiency on which Congress premised passage of the Act. As explained in the legislative history, "with proper education services, many [handicapped individuals] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 455, 94th Cong., 1st Sess. ——, *reprinted in* [1975] U.S. Code Cong. & Ad. News, 1430, 1433; *See Kruelle v. New Castle County School District, supra,* at 7-8 (slip op.); *Battle v. Commonwealth of Pennsylvania,* 629 F.2d 269, 279 (3d Cir. 1980) *cert. denied* 49 U.S.L.W. 3954 (U.S. June 22, 1981). In Amber's case, the chief occupational therapist at the Pittsburgh Children's Hospital, whom the school district had requested the Tokarciks to consult, recommended a therapy program for Amber which included instruction in self-catheterization. And as the Secretary of Education noted,

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[26] Indeed, if the school district did not have a nurse or aide available to catheterize Amber, it would still be obligated to provide her with an appropriate education. And the two possible alternatives—at home instruction or a special class for the handicapped—would appear to be less cost beneficial.

in promulgating the agency interpretation requiring CIC, "with normal intelligence most children are able to self-catheterize from approximately six to seven years of age." The majority, consequently, do not require assistance throughout their school years. By providing the CIC service, the school would thus be educating Amber to perform the service herself and helping her to become the independent, productive citizen contemplated by the Act.

V.

Having determined that we have jurisdiction over the interlocutory injunctive order and that the action is not time barred, we affirm the order of the district court directing the provision of CIC as a related service.

ROSENN, *Circuit Judge,* dissenting:

The problems of a handicapped child stir our emotions, but the threshold issue of the applicable statute of limitations is so overriding that its proper resolution transcends all other considerations. I am not persuaded by Part III of the majority opinion that any policy considerations militate against application of the most analogous statute of limitations available. In the instant case, the most analogous state statute, 42 Pa. Cons. Stat. Ann §5571(b) (Purdon Supp. 1981); prescribes a 30-day limitation period for appeals from decisions of administrative agencies. Because I believe the majority's application of a 2- or 6-year statute of limitations may be counterproductive, in the long run, to the educational development of children whose inclusion in or exclusion from a handicapped program is disputed by the child's parents or school authorities, I respectfully dissent.

I.

My disagreement with the majority over what is an appropriate limitations period for this type of action stems from what I perceive to be significant deficiencies in the majority's analysis. The majority recognize the general rule that in the absence of a Congressionally prescribed limitations period governing assertion of federal rights, the statute of limitations applicable to analogous actions in the forum state controls. Maj. op., typescript at 9-10. And, although the majority eschew mechanical application of the rule, relying on language in *Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946), they make no pretense of following the lead of that case in establishing an independent federal limitations pe iod for section 1415(e)(2)

actions. *See* maj. op., typescript at 22 n. 21. Thus, one must assume that the majority's decision to apply either a 2- or 6-year statute of limitations results from an application of the general rule. It then becomes clear that although their opinion nowhere announces such a conclusion, the majority have necessarily decided that actions under section 1415(e)(2) are more closely analogous to original lawsuits than to appeals from administrative rulings. I cannot agree.

To the extent their opinion discloses the analysis underlying the conclusion that original actions are the appropriate state analogues to section 1415(e)(2) proceedings, the majority appear to have relied on four points. First, although an earlier version of the statute clearly referred to an "appeal" of the administrative decision, the current version authorizes aggrieved parties to bring a "civil action" for relief. Second, the statute provides that this civil action is to be conducted without any of the traditional restrictions of appellate review: evidence not introduced in the administrative proceeding may be received, any appropriate relief may be afforded, and the decision is to be based on the preponderance of the evidence. The majority also point out that other courts have held that exhaustion of state administrative remedies is not necessary before bringing a section 1415(e)(2) suit if pursuit of those remedies would be futile. Finally, the majority emphasize that, although all administrative proceedings here took place at the state level, the decision directly under review by this court was rendered in a federal forum.

As to the majority's first point—that the statutory language evinces an intent to authorize an original action rather than appeal—examination of the relevant legisla-

tive history persuades me otherwise. The requirement that participating states establish procedural safeguards to accompany "identification, evaluation, and educational placement of handicapped children" was first imposed by the Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, tit. VI, §614(d), 88 Stat. 484, 581 (1974). The relevant language of those amendments directed that states, when applying for federal funds to aid in education of the handicapped, include in their compliance plan "provision to insure that the decisions rendered in the impartial due process hearing . . . shall be binding on all parties subject only to appropriate administrative or judicial appeal." There can be no question, then, that in its original form 20 U.S.C. §1415 provided for judicial review of agency action only by direct appeal, not by collateral attack through an original action.

The present language of 20 U.S.C. §1415 is derived from the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §5(a), 89 Stat. 773, 788 (1975). Specifically, the language of particular moment to this case, that contained in subsection (e) of section 1415,[1] was inserted into the legislation during the con-

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[1] This section provides:

(a) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the

NOTE — *(Continued)*

ference on conflicting House and Senate versions of the Act. The conference committee offered the amendment with the following pertinent explanation:

> The Senate bill re-enacts the provisions of existing law [Pub. L. No. 93-380] relating to procedural safeguards for handicapped children and parents and guardians of handicapped children, requires their establishment as a condition of state eligibility under this part and makes . . . changes to these provisions [not relevant here]. . . .
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>
> The House bill retains the provisions of existing law relating to procedural safeguards as part of the state plan and adds the following:
>
> . . .
>
> (6) Actions may be brought in the district courts of the United States *to appeal* the determinations of the State educational agency and in such actions the findings of fact of the State educational agency shall be conclusive if supported by substantial evidence and the district courts may remand the case to the State agency to take additional evidence.
>
> The following conference substitute is adopted in order to clarify and strengthen the procedural safeguards in existing law.
>
> . . .

NOTE — *(Continued)*

court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

> (9) The provisions of *existing law* with respect to judicial action are *clarified and strengthened* to assure that any party aggrieved by the findings and decision rendered in the due process hearing or the State educational agency review of such hearing shall have the right to bring a civil action with respect to the original complaint and matters relating thereto.
>
> . . .

S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 47-50, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1500-03 (emphasis added).

The conference committee's remarks thus make clear that the bills passed in each house of Congress retained the then-existing requirement that challenges to adverse state agency action be mounted by way of direct appeal. The majority's conclusion that the conference substitute created a new original federal cause of action therefore presupposes that the conference committee completely disregarded the views of both houses, developed after extensive hearings, that direct appeal was a sufficient judicial remedy, and instead created a new, broad, general federal remedy for violations of the Act. Moreover, the majority's theory further assumes that this action was taken without the benefit of any hearings and under the guise of "clarify[ing] and strengthen[ing] the procedural safeguards in existing law." *See supra* at 4. Although I do not contend that such a move exceeds the authority of a Congressional conference committee, I believe that the validity of presuming such action is negated by the debate surrounding the adoption of the conference substitute.

The first observation to be made about the debates on the conference bill is that they were relatively short

and consisted almost exclusively of prepared endorsements of the legislation. *See* 121 Cong. Rec. 37023-32 (1975) (House of Representatives); 121 Cong. Rec. 37409-20 (1975) (Senate). Nowhere in the debates does one find mention that fundamental alterations in the private enforcement mechanism have been effected. Indeed, the remarks of the bill's managers and sponsors indicate the contrary. Rep. Brademas, who managed the conference bill for the majority in the House, indicated to his colleagues that the conference substitute was substantially identical to the earlier House bill. 121 Cong. Rec. 37023 (1975). When commenting on the procedural section of the bill, Brademas spoke only of the administrative due process hearings to be conducted by state and local agencies, noting that "[t]his provision is similar to that adopted earlier by the House." 121 Cong. Rec. 37032 (1975). Rep. Mink, a co-sponsor of the legislation and a member of the conference committee, described the operation of the "grievance and compliance mechanism" for her colleagues, specifically explaining that "the decision on the state level can be *appealed to a State or district court.*" 121 Cong. Rec. 37031 (1975) (emphasis added).

In the Senate, Sen. Harrison Williams, the self-described "principal author of the bill," prefaced his remarks concerning the procedural provision of the conference bill with the following:

> I am enormously pleased with the action taken by the conferees with respect to protecting the individual rights of handicapped children and their parents. In the Education Amendments of 1974, the Congress adopted a series of procedural safeguards to assure that state and local educational agencies

> did not make inappropriate decisions regarding the identification, evaluation, and educational placement of handicapped children. And, if a child's parents disagreed with those decisions they could secure an impartial due process hearing at the State or local level and secure appropriate relief. Further, the parents or the educational agency involved could *appeal* the decision in the due process hearing *to the State or Federal Courts.*
>
> In order to strengthen these provisions, both the House and Senate bills established additional machinery through which parents could assure that their children were receiving the kind of special educational services required under this new law. However, rather than create additional mechanisms, the conferees believed that the best course of action was to refine and *build upon existing procedural safeguards.*

121 Cong. Rec. 37415 (1975) (emphasis added). The thought expressed by Sen. Williams thus echoes the concerns of Sen. Stafford, ranking Senate minority member on the conference committee, who noted the committee's recognition that most states had enacted legislation implementing the procedural safeguards of Pub. L. No. 93-380 and then continued, "[t]he conferees had no desire to have States have to act again to meet a Federal standard." 121 Cong. Rec. 37412 (1975).

Inasmuch as I find nothing in the Congressional debates to indicate that the conference committee accomplished the extraordinary change in the law which is assumed in plaintiffs' theory, I believe this court would be ill-advised to presume such an action unless the statutory

language is clear and unambiguous or cannot be reasonably understood to mean otherwise. I do not find the language of the statute to be so compelling. The use of the term "civil action," I believe, resulted from a Congressional desire to avoid confusion between the judicial appellate remedy the administrative appellate remedy established in section 1415(c). Further, to the extent the majority consider statutorily created "civil actions" to have an inherently original function the conference committee's description of the House bill indicates a contrary understanding:

> The House bill retains the provisions of existing law relating to procedural safeguards as part of the state plan and adds the following:
>
> . . .
>
> (6) *Actions may be brought* in the district courts of the United States *to appeal* the determinations of the State educational agency . . . .

(Emphasis added).

The majority's second and perhaps strongest basis for analogizing 1415(e)(2) proceedings to original actions stems from the statutorily prescribed manner in which they are to be conducted. I do not dispute that to an observer not many outward distinctions may appear between these proceedings in the district court and original lawsuits. To that extent, I can agree with the majority that 1415(e)(2) suits are analogous to original actions. However, to the same extent, 1415(e)(2) proceedings are analogous to appellate proceedings brought under the following Pennsylvania statutes: Pa. Stat. Ann. tit. 47, §4-464 (Purdon Supp. 1981-82) (de novo review of ad-

verse agency action concerning liquor licenses);[2] 75 Pa. Con. Stat. Ann. §1550 (Purdon Supp. 1981-82) (de novo review of administrative denial, suspension, or revocation of driver's license);[3] and 42 Pa. Cons. Stat. Ann. §7361 (Purdon Pamphlet 1981) (de novo review of matters referred to compulsory arbitration under same section). Furthermore, these appeal proceedings are *more* analogous to 1415(e)(2) than are typical original actions because they are preceded by a series of administrative evidentiary proceedings concerning the same issue as is litigated in court. Therefore, I do not believe that the similarity in outward appearance is an adequate basis for rejecting appeals from agency action and adopting original lawsuits as the most appropriate analogies to section 1415(e)(2) proceedings.

Third, the majority place implicit reliance on other courts' use and, in certain instances, waiver of exhaustion doctrines in connection with 1415(e)(2). Of course, the very use of the term "exhaustion" loads the question whether an action is original or appellate. Exhaustion doctrines are commonly applicable to original actions brought as collateral attacks on decisions or judgments

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[2] The majority make reference to the limited options—approval or disapproval—available to a court proceeding under this statute and then assert that a court entertaining a 1415(e)(2) suit can "sculpt" relief beyond that afforded in the administrative agency. This is a hollow distinction and results only from the nature of the issues involved: a license is either granted or denied, thus, the agency is either right or wrong. On the other hand, planning a child's school day obviously entails making a series of decisions and adjustments, each of which is subject to approval, disapproval, or modification by the reviewing body.

[3] *See* Commonwealth v. Quinlan, 47 Pa. Commw. Ct. 214, 408 A.2d 173 (1979).

rendered in a different forum within another adjudicatory system. The most common of the exhaustion doctrines is statutorily prescribed in 28 U.S.C. §2254 (1976), requiring that state prisoners petitioning the federal courts for writ of habeas corpus exhaust all state remedies. Only in a very loose sense of the word, if at all, can it be said that appellate actions require exhaustion of other remedies. Therefore, because I believe section 1415(e)(2) authorizes only appeals from administrative action, I do not believe that traditional "exhaustion" principles apply. Further, I find unacceptable a process by which the required steps leading to an appeal may be ignored on grounds of futility.

I do, however, recognize that other courts have treated actions to enforce the EAHCA as involving exhaustion principles. *See* maj. op., typescript at 8 n. 5. None of those courts, however, was called upon to decide the precise issue before us. Even in *Monahan v. Nebraska*, 645 F.2d 529 (8th Cir. 1981), it appears that the State acquiesced in the district court's resolution of the statute of limitations issue and that the Eighth Circuit therefore was not bound to address it. Without attempting to reconcile all of these cases, each with its particular facts, to my view of the statutory scheme as an appellate process, it should be noted that at least in *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979), the court expressly pointed out that the action before it was based on an implied cause of action for damages under the Act. *Id.* at 113. As the majority observe in the instant case, implied private causes of action are generally original. Maj. op., typescript at 11. To the extent the Tokarciks are attempting to avail themselves of an implied right to recover damages, therefore, my views may differ. But the majority does not

address that aspect of their claim. *See* maj. op., typescript at 23, n. 22. Thus, the relevant claim on this appeal is the one predicated on section 1415(e)(2) and that action, in my opinion, is an appeal with the normal requirement that it be pursued only after all preceding stages of the procedural framework have been completed.

Finally, the majority's identification of orginal actions as 1415(e)(2) analogues is based on the fact that the administrative proceedings are conducted at the state level and the judicial action may be federal. This argument does not impress me. The Supreme Court of the United States hears cases from both state and federal systems and dockets both types according to the same schedule. *See* 28 U.S.C. §2104 (1976). Further, because Pennsylvania procedure calls for section 1415(e)(2) actions to be filed in Commonwealth Court,[4] which sits only in Pittsburgh, Harrisburg, and Philadelphia, I am at a loss to understand why filing the action in the federal district courts in those same cities is more burdensome.

On the basis of the foregoing, I am constrained to disagree with my colleagues that section 1415(e)(2) proceedings are more in the nature of an original action than an appeal. I also consider their position to be inconsistent with a previous interpretation of the law by this court, *see Battle v. Pennsylvania,* 629 F.2d 269, 273 (3d Cir. 1980), *cert. denied,* 49 U.S.L.W. 3954 (U.S. June 23, 1981) ("any party aggrieved by the decision of the state agency has a right to appeal to a state court of competent jurisdiction or to a district court of the United States.

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[4] *See* Shanberg v. Commonwealth, Pa. Commw. Ct. , 426 A.2d 232 (1981); Krawitz v. Commonwealth, 48 Pa. Commw. Ct. 155, 408 A.2d 1202 (1979).

[20 U.S.C.] §1415(e)(2)"), and with the procedure adopted by Pennsylvania's Commonwealth Court, *see Shanberg v. Commonwealth,* Pa. Commw. Ct. , 426 A.2d 232 (1981); *Krawitz v. Commonwealth,* 48 Pa. Commw. Ct. 155, 408 A.2d 1202 (1979).

I am also unable to accept the majority's decision because, when viewed in the context of the whole of section 1415, including 1415(e)(3)'s "stay put" provision, I believe the construction they place on the Act makes shambles of the procedural schema. Under the majority's view, the procedural protections of section 1415 are carried out in two stages. The first stage, consisting of the administrative proceedings, may be disregarded if pursuit of the remedies offered at that level would be futile. However, if some hope of relief through administrative channels exists, this level of section 1415 procedures must be followed and, during their pendency, the educational placement of the child will remain as it was when the dispute first developed, the so-called "status quo." The administrative proceedings are to be followed through to their end until a final decision is rendered by the state educational agency. This decision under the majority theory is unreviewable. The rub to such an interpretation of the statute comes when section 1415(e)(3) is applied. Notwithstanding the finality and unreviewability of the state educational agency's decision, if it differs from the status quo, it cannot be implemented until the second stage of the 1415 remedies is concluded. This second stage, according to the majority, includes at least an original federal action, and perhaps appeals, governed by a 2- to 6-year statute of limitations. The practical implications of such a construction aside, the notion that a final and unreviewable decision cannot be implemented for up

to six years while awaiting collateral attack is contrary to basic Anglo-American legal theory.

I conclude, based on the relevant legislative history, the language and operation of the Act, and the absence of persuasive legal precedent to the contrary, that 20 U.S.C. §1415(e)(2) authorizes only appeals from adverse administrative action and that the action before us must be so characterized. Having reached that conclusion, I have little difficulty identifying 42 Pa. Cons. Stat. Ann. §5571(b) (Purdon Supp. 1981) as the forum state statute governing analogous[5] state actions. Therefore, under the general rule discussed *supra* at 1-2, the Tokarciks' action was barred by the 30-day statute of limitations unless application of that statute would be "inconsistent with the federal policy underlying the cause of action." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975).

II.

The majority identify three federal policies that would allegedly be undercut by application of a 30-day statute of limitations to cases of this type. First, the ma-

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[5] The majority follow the decision of the district court in Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), and hold that the de novo nature of the proceeding in the district court renders it unanalogous to state appeals from administrative agencies. As I pointed out earlier in the text, however, Pennsylvania authorizes several de novo appellate actions which would, in practical terms, be indistinguishable from a section 1415(e)(2) action in a district court. All three Pennsylvania appellate actions to which I have referred are governed by limitations periods no greater than thirty days. In fact, both the driver's license appeals and the appeals from arbitration are controlled by the statute offered in the text as controlling the action before us.

jority assert that a 30-day period is incompatible with the Act's provision of de novo review because it significantly limits the new evidence that can be discovered and developed before the appeal is filed. Second, a related concern of the majority is that the resulting inability of the parties to produce for trial significant evidence not considered by the administrative bodies will diminish the reviewing court's effectiveness as an "external check" on the institutional pressures and biases to be found in state educational agencies. Finally, the majority resist imposition of a 30-day limitations period because they believe that parents and guardians who represent themselves in the administrative proceedings may be "unfairly penalized" by such an action.

As to the first two objections, I fail to see why requiring a party to file a complaint within thirty days severely restricts the evidence that will be presented at trial. First, after completion of all the formal and informal proceedings at the administrative level, one can assume that by the time the proceedings reach the appellate stage the parties will have drawn upon all the relevant evidence, and that the need for additional evidence will be exceptional. This very case is illustrative, for the trial judge relied exclusively on the administrative record and a set of stipulations. Second, in the absence of legislative provision specifically providing for priority disposition, the time lag between filing the appeal in the district court and hearing should offer ample time for development of additional evidence should that become necessary. For example, in the Western District of Pennsylvania, the case will not come to trial for at least eleven months, simply as a result of the court's backlog. Even in the case before us it was fourteen months after the complaint was filed

that plaintiffs moved for and obtained summary judgment on their Education Act claim. Finally, the scope of this type of litigation is generally quite narrow. These are not complex products liability or patent cases. The principal issues under the EAHCA will generally concern themselves with the nature and extent of the child's disability, and proof bearing on those issues will almost always be in the form of medical opinion from a doctor or a nurse. This type of evidence should be readily available and discoverable during both the administrative stage of the proceedings and the appeal and de novo hearing in the district court. It is simply unrealistic to assume that in the rare case in which additional evidence may be necessary, a plaintiff will be unable to discover and develop it after the complaint is filed but before a trial is held.

In contrast to the majority's approach, the entire thrust and schema of the Act is to assure prompt resolution of disputes concerning the educational status of handicapped children. This is manifested in the regulations governing the administrative proceedings, which require that the formal due process hearing be completed within 45 days after it is requested, and that the review of that hearing be completed within 30 days after receipt of the request for such review. 45 C.F.R. §121a.512(a) & (b) (1980). This call for promptness is inconsistent, in my opinion, with the majority's decision, which allows the party adversely affected by the agency decision six years to appeal it and obtain a final determination of the controversy. I also note that, during those six years, the child's Individualized Education Program will be re-evaulated at least six times, and the child will be re-evaulated at least twice. 45 C.F.R. §§121a.343(d), 121a.534(b) (1980). The majority's application o a multi-year statute of limita-

tions could conceivably leave each of these re-evaluations, except for the last, in a state of suspense.

I further believe that a reviewing court's ability to function as an "external check" on administrative action under the Act derives from its broad scope of review, rather than its authority to hear new evidence. Although the Act's language is very plain concerning the admissibility of evidence not in the administrative record, the goals of the Act—prompt and cooperative resolution of disputes—would not be well-served by an attitude reserving full preparation and exposition of the case for court proceedings.

As to the majority's third concern, that imposition of a 30-day limitation period might operate to disadvantage lay participants, it should be noted that 20 U.S.C. §1415 (b) (1) (D) requires the state fully to inform parents and guardians of the procedural avenues open to them under that section.[6] Thus, laypersons at least know that they have a right to appeal to court and, if they desire to prosecute the appeal themselves, are clearly advised by Pennsylvania's judicial code that the appeal must be filed within thirty days. Such protections, in my opinion, sufficiently minimize the danger of undue penalty as to render the 30-day statute not "inconsistent" with the federal policy of encouraging lay participation.

The final argument of the majority on this issue is that the "stay put" provision of 20 U.S.C. §1415(e) (3)

[6] The record before this court indicates that the Tokarciks received such a notice and that it informed them of their right to appeal the agency decision according to the provisions of the Appellate Court Jurisdiction Act of 1970, the source of 42 Pa. Cons. Stat. Ann. §5571(b) (Purdon Supp. 1981-82), which provides for appeals within thirty days.

militates against application of a fairly short limitations period because it serves to maintain the child in a "second best" educational placement during the pendency of administrative and judicial proceedings. Maj. op., typescript at 20-21. I respectfully submit that such an argument ignores the objectives of this Act and the realities of educating exceptional children.

In the final Senate debate on this legislation, Sen. Williams exhorted his colleagues as follows:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the *urgent need for prompt resolution* of questions involving the education of handicapped children it is expected that *all hearings and reviews* conducted pursuant to these provisions will be *commenced and disposed of as quickly as practicable* consistent with a fair consideration of the issues involved.

121 Cong. Rec. 37416 (1975) (emphasis added). I find these views to be wholly inconsistent with an interpretation of this Act by the majority that would authorize placement of a handicapped child in a "second best" educational situation for up to six years. Under such a rule, it is entirely conceivable that a child whose initial educational placement in the public schools gave rise to a dispute could spend his or her entire elementary schooling in an inappropriate program.

The majority's willingness to allow the Tokarciks to press their 1415(e) claim rests in large part on the pre-

sumed consequences to Amber if that action is found to be time-barred. However, the majority make several references to alternative remedies available to the family, at one point even appearing to imply that a finding that the 1415 action was time-barred would make no practical difference. *See* maj. op., typescript at 19 n. 17. But, there *would* be a difference; the "stay put" provision would not bar implementation of a final agency decision for six years pending collateral attack. The majority seem willing to hold that every claim that can be asserted in a section 1415(e)(2) review proceeding can be asserted in independent original actions, based on section 1983 or even on an implied cause of action under the EAHCA. Therefore, even hardship in an individual case is not a legitimate basis for allowing this 1415(e)(2) action to proceed and thereby distort unreasonably the operation of the statute.

I quite simply am unable to see any justification for prolonging any longer than absolutely necessary disputes concerning the appropriate educational placement of a handicapped child. The mere existence of the dispute is evidence that one party—either the child's parents or the schools—believes that the current placement is inappropriate. Thus, although the majority is perhaps correct in characterizing the status quo ante as "second best" because it was the most recently agreed upon, it still is arguably not the best. I am convinced that every week a handicapped child spends in an improper educational grogram retards his or her development, and I therefore believe that expeditiousness is indeed the key to effective administration of section 1415.

Accordingly, I would reverse the judgment of the district court and remand with instructions to dismiss the complaint insofar as it presents an appeal under 20 U.S.C. §1415 (e) (2).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2844/45

Amber Tokarcik, etc., et al.

v.

Forest Hills School District, et al.,
Appellants in No. 80-2844

Pennsylvania Dept. of Education, et al.,
Appellants in No. 80-2845

SUR PETITION FOR REHEARING
EN BANC

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges.*

The petition for rehearing filed by Appellants, Robert Scanlon and the Pennsylvania Department of Education, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Arlin M. Adams,
Circuit Judge

Dated: October 2, 1981

§1401. Definitions

As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * * * * * * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public super-

vision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

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§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handi-

cap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established

for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Pub.L. 91-230, Title VI, §612, Apr. 13, 1970, 84 Stat. 178; Pub.L. 92-318, Title IV, §421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub.L. 93-380, Title VI, §§614(b), (f)(1), 615(a), Title VIII, §843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub.L. 94-142, §§2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89 Stat. 773, 774, 780.

* * * * * * * *

§1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

* * * * * * * *

(b) (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

* * * * * * * *

Civil action; jurisdiction

(e) (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does

not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, §615, as added Pub.L. 94-142, §5(a), Nov. 29, 1975, 89 Stat. 788.

* * * * * * * *

Opposition

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81-1290

No.

In the Supreme Court of the United States

October Term, 1981

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania, and the PENNSYLVANIA DEPARTMENT OF EDUCATION,
Petitioners

vs.

AMBER TOKARCIK et al.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

---

1. Whether a civil action brought under the Education of All Handicapped Children Act and filed in the District Court 82 days after a final decision of the state educational agency is barred by the 30 day state statute of limitations for filing appeals from final decisions of state administrative agencies? *No.*

2. Whether clean intermittent catheterization (CIC) is a related or supplementary aid or service which is required by the Education of All Handicapped Children Act to be provided by school authorities so as to enable a handicapped child to participate in and benefit from the regular public educational program? *Yes.*

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COUNTER-STATEMENT OF THE CASE

This is an appeal from a judgment entered by the Third Circuit Court of Appeals on September 2, 1981, rehearing denied October 2, 1981, affirming an order entered by the District Court on October 31, 1980, directing the Petitioners to provide the Respondent, Amber T., with CIC so long as she attended their school and was in need of such services.

Amber T. was born February 10, 1971, with a congenital defect known as spina bifida. Consequently, she is a paraplegic suffering from a neurogenic bladder which requires CIC every three or four hours. She was enrolled in the Petitioner's, Forest Hills School District, Public Education Program in September 1976. The Respondents then, and periodically thereafter, requested Petitioners to provide the CIC service. However, Petitioners refused to provide the requested services.

By letter dated June 28, 1978, sent to Petitioner, Forest Hills School District, the Respondents requested an administrative hearing. On December 22, 1978, the Pennsylvania Secretary of Education affirmed the decision of the Hearing Officer which held that the school authorities are not required to provide CIC services for Amber. The Respondents then filed their civil action in the instant case on March 14, 1979.

ARGUMENT

1. Whether a civil action brought under the Education of All Handicapped Children Act and filed in the District Court 82 days after a final decision of the state educational agency is barred by the 30 day state statute of limitations for filing appeals from final decisions of state administrative agencies? No.

The pertinent section of the Education of All Handicapped Children Act, hereinafter referred to as the EAHCA, provides:

> "Any party aggrieved by the findings and decision made under subsection (b) of this section . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this subsection, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate." 20 U.S.C.A. §1415(e)(2).

It is significant that the Act speaks of bringing a *civil action*, rather than "appealing to," or "filing an appeal in", or similar language. Within the section itself Congress has used the term "appeal" when it is clear that

they meant and understood to grant an aggrieved party that privilege. Therefore, when they used the term *"civil action"*, or *"action"*, it should be most compelling to any reader of this statute that Congress intended to mean something different than bringing an "appeal" when they used the expression *"civil action"*, or *"action"*, in this section.

When the court considers the matter, this section requires it to receive into evidence the record of the administrative proceedings and to receive any additional evidence at the request of a party, and then to render an appropriate decision based upon a preponderance of the evidence. This language suggests that the role of the court is to make an independent determination of the controversy and not merely to accept the findings of a hearing officer, or the Secretary of Education, when supported by substantial evidence. *Enforcing the Right to an "Appropriate" Education,* 92 Harv. L.R. at 1108 (1979), citing *Lora v. Board of Education,* 456 Fed. Supp. 1211 (E.D. N.Y. 1978). It is the contention of the Respondents that the administrative record which the federal district court must receive into evidence is nothing more than *"some"* evidence which it must consider, along with any other competent and relevant evidence which any party may wish to introduce into the record, in rendering a decision based upon a "preponderance" of all the evidence. It is then expressly empowered to grant such relief as it "determines is appropriate." The District Court and the Appellate Court below both held that the filing of the present action was, in effect, a *de novo* proceeding. Accord, *Monahan v. State of Nebraska,* 491 F. Supp. 1074 (D. Neb., 1980).

Argument

The Petitioners contend that a specific purpose of the EAHCA is to resolve expeditiously questions concerning the appropriate special education placement of a handicapped child. They point out that the implementing regulations ". . . set out strict timeliness governing the administrative process, including the school district hearing and the state agency review, such that the state agency decision must be issued within 75 days of the request for an administrative hearing." (Pet. 9)

Despite these time constraints the Petitioners took 177 days from the date they received Respondents' request for an administrative hearing on June 29, 1978, until they rendered their final administrative decision on December 22, 1978.

The violation of Petitioners had persisted for 2 years before Respondents requested the administrative hearing. Those violations continued every day that Amber attended school thereafter until the District Court below rendered its decision on October 31, 1980, directing Petitioners to provide her with CIC services so long as she attended their school and was in need of such services. Therefore, because Petitioners' alleged violations persisted continuously beyond the time Respondents commenced this civil action, the Respondents had a continuing right to bring this action in the Federal District Court AT ANY TIME after December 22, 1978. Such right existed as late as April 18, 1980, when all parties stipulated that all material facts upon which this action was based were the same as those that had existed during and after the administrative proceeding.

If we were to accept Petitioners' argument that this action should be barred since it was not commenced with-

in 30 days after the date of the final administrative hearing, then we must conclude that Petitioners claim the Respondents must have gone through another full administrative hearing process in order to revive their right to initiate this civil action under the EAHCA. This would be an absurd requirement since Pettioners admitted 13 months after the action was commenced that all material facts were the same, and because they continued to dispute the contentions of the Respondents that they were legally obligated to provide Amber with CIC services we must conclude that the Petitioners would hand down the same decision in 1979 and 1980 that they had on December 22, 1978. Although it is true that there is no limitation upon the number of times during a year that the parents of a handicapped child have the right to request a hearing, as Petitioners admit (Pet. 11), it would be an absolute waste of time and an unreasonable delay to the Respondents to have required them to go through another administrative hearing before filing the present action.

In *Loughran vs. Flanders,* 470 F. Supp. 110 (D. Conn., 1979), the court held that exhaustion of the administrative state remedy before bringing a civil action in federal court under the EAHCA is never required where resort to the state proceeding would be futile. It certainly would have been futile for the Respondents to go through a second administrative hearing before filing their action in the federal court.

In support of their contention that the Respondents' action should be barred as not having been timely filed within 30 days after December 22, 1979, Petitioners rely upon the following statement in Judge Rosenn's Dissent in the court below:

> "I am convinced that every week a handicapped child spends in an improper educational program retards his or her development, and I therefore believe that expeditiousness is indeed the key to effective administration of Section 1415." (Pet. 16, and 83(a))

If Judge Rosenn and Petitioners are truly sincere in their desire to have this question resolved as expeditiously as possible, why would they require Respondents to go through another full administrative proceeding in order to be entitled to bring their civil action in federal court? Would they not be requiring the Respondents to go through a futile proceeding which could only mean further time and expense to all parties and an unreasonable delay in the final judicial determination of this cause?

Wherefore, Respondents pray the Court to affirm the judgment of the court below which found that this action brought under Section 1415(e)(2) of the EAHCA 82 days after the entry of the final administrative decision was not barred by the Pennsylvania 30 day statute of limitations for filing appeals from decisions of administrative agencies.

---

2 Whether clean intermittent catheterization (CIC) is a related or supplementary aid or service which is required by the Education of All Handicapped Children Act to be provided by school authorities so as to enable a handicapped child to participate in and benefit from the regular public educational program? Yes.

"Handicapped children" means "mentally retarded, hard of hearing, deaf, speech impaired, visually handi-

capped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, . . . who by reason thereof require special education and related services." (20 U.S.C.A. 1401(1)). As a paraplegic with neurogenic bladder requiring CIC, Amber is obviously a handicapped child under this Act and its implementing regulations. In fact, Dr. Warren Howard, former Superintendent of the Petitioner, Forest Hills School District, admitted that she was a handicapped child under the federal educational statutes and regulations.

"Related services" as used in this part, 45 CFR 121a.13(a),

> "means transportation and such developmental, corrective and other supportive services as are required to assist a handicapped child to benefit from special education and includes . . . physical and occupational therapy, . . . the term also includes school health services, . . .
>
> (b) The terms used in this definition are defined as follows:
>
> (5) 'Occupational therapy' includes, (I) improving, developing or restoring functions impaired or lost through illness, injury or deprivation; . . ."

In Amber's occupational therapy evaluation, dated July 18, 1978, from Children's Hospital, Pittsburgh, Pennsylvania, the following recommendations were made:

> "1. When possible, standing to perform classroom activities;
>
> 2. Provide supervision in intermittent self-catheterization through qualified medical personnel;

3. Encourage to ambulate using crutches; and

4. Encourage total independence in activities of daily living as possible."

Although one of the recommendations was that Amber be assisted in self-catheterization, nevertheless, the Petitioners have consistently refused to provide this service as part of the occupational therapy provided by school personnel. Clearly the required CIC services are necessary to improve, develop, or restore functions that Amber has been deprived of from birth. Until such time as she is able to perform this service safely on her own behalf, the Petitioners should be required to provide it for her while she is in attendance at school as part of their legal obligation to provide occupational therapy, which is included within the concept of "related services."

The Petitioners contend that a service in order to be "related" must be directly involved in the effort to instruct (Brief of School District Page 8, and Brief of Dept. of Ed. and Scanlon pp. 29-31). However, such contention completely disregards those provisions of the Act requiring non-academic service.

Transportation was included as one of the specified non-academic "related services." It includes "travel to and from school and between schools, . . ." 45 CFR 121a.13(b) (13) (i). Amber is provided special transportation by the Petitioners to and from school. This is obviously not directly related to any instructional service provided to her by the Petitioners. It merely gets her to school in order that she may exercise her right to a "free appropriate public education."

Argument

At the end of this section in the regulations on "related services" the following statement appears: "Senate Report, 94-168, page 12 (1975). The list of related services is not exhaustive, and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education."

Free Appropriate Public Education

Since the Petitioner, Pennsylvania Department of Education, is receiving funds under the EAHCA, 20 U.S.C. 1401, et seq., it must have assured the Federal Commissioner of Education that it has in effect ". . . a policy that assures all handicapped children the right to a free appropriate public education." This "free appropriate public education" must be provided by main-streaming a handicapped child in the regular public school program. This requirement is found in 20 U.S.C. 1412(5)(B), which provides that the State has established ". . . procedures to assure that, to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped, and special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 45 CFR 121a.550; *Pa. Assn. for Retarded Children vs. Comm. of Pa.*, 334 Fed. Supp. 1260 (E.D. Pa., 1971). Note that both the statute and regulations use the phrase, ". . . with the use of supplementary aides and services. . . ." This,

the Respondents contend, is a deliberate intent by Congress to denote an expansion in the concept of "related services." They did not use the term "related services," which they had previously defined and used in conjunction with "special education." However, here they chose to use the term "supplementary aids and services" which might be necessary to mainstream a handicapped child in the regular public education program.

Thus it would appear from the stated purpose of the Act and this section that some changes in the usual public education services were to be made, not in the basic instructional education program itself, but in the services—supplementary aids and services—which would enable handicapped children, such as Amber, to obtain a free appropriate public education in a regular classroom so long as that can be achieved satisfactorily with the provision of such supplementary aids and services.

Petitioners argue that the state school health services are diagnostic and record-keeping in nature, and if CIC is found to be a related service then the school would be required to perform expensive services such as transfusions, administering medications, injections, etc. (Pet. 13-14). The Act clearly imposes some affirmative duties upon school personnel to be performed on behalf of handicapped children which were nonexistent prior to its enactment. We are not here to argue whether the Act requires Petitioners to perform any related services or supplemental aids and services, on behalf of Amber other than to provide her with CIC services. The Petitioners are already required by state law to have qualified school nurses in the school attended by Amber, and catheterization is a procedure taught to all nurses in Pennsylvania as part of

their nurses training. Therefore, Petitioners have absolutely no support in fact for their contention that it would create undue expense upon the schools to require their nurses to perform CIC for children in attendance at their schools and in need of such services.

The Petitioners find fault with the holding of the Court below that "related services necessarily include what is required within reason" to make instruction in a regular classroom possible for a handicapped child (Pet. 12, and 57(a)). However, the Court has given meaning to the entire Act, including Section 1412(5)(B), which obviously expands upon the concept of "related services". The argument of Petitioners that, if a child requires only a related service the Act is inapplicable (Pet. 19), has no application to the facts in the instant case. Clearly Amber T. is a handicapped child receiving special education within the terms of the EAHCA, and as such she should be entitled to all of the rights, privileges and protections contemplated by the Act.

There are no lower Court decisions, either on the district or circuit levels, which are in conflict with the judgments entered by the lower Court in the instant case. The only other Circuit Court case which considered CIC under the provisions of the EAHCA was *Tatro, et al. vs. State of Texas, et al.*, 625 F.2d 557, reversing and remanding, 481 F. Supp. 1224 (5th Cir. 1980). The decision in that case was entirely in accord with the opinion in the instant case. Therefore, since there is absolutely no conflict among the decisions of the lower courts in holding that CIC is a related, or supplementary aid or service, which must be provided to a handicapped child under the EAHCA in order to enable that child to participate in and

enjoy the benefits of a free appropriate public education, this Court should affirm the judgment of the Third Circuit Court of Appeals entered herein on September 8, 1981, and dismiss the Petitioners' prayer for a writ of certiorari to review that judgment.

Note: Amber T. has developed sufficient skills to conduct self catheterization, and has been doing so at school daily during the 1981-1982 school year with minimal supervision and assistance from school personnel.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed and the petition for writ of certiorari should be denied.

Respectfully submitted,

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Date: February 1, 1982.

CERTIFICATIONS

I certify that I was admitted to the Bar of the United States Supreme Court on October 13, 1981.

(s) EDWARD R. SCHELLHAMMER,
EDWARD R. SCHELLHAMMER,
Attorney for Respondents

I certify that I was admitted to the Bar of the United States Supreme Court on April 20, 1981.

(s) RANDALL J. DICKS,
RANDALL J. DICKS,
Attorney for Respondents

I certify that on January 4, 1982, I received 3 copies of the Petition for Writ of Certiorari filed by Allen C. Warshaw, Deputy Attorney General, Chief, Civil Litigation; Ernest N. Helling, Assistant Counsel, Department of Education; and Leroy Zimmerman, Attorney General, Attorneys for Petitioners.

(s) EDWARD R. SCHELLHAMMER
EDWARD R. SCHELLHAMMER
Attorney for Respondents

Amicus Brief

1

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No. 81-1290

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania and the PENNSYLVANIA DEPARTMENT OF EDUCATION,
Petitioners

v.

AMBER TOKARCIK, et al.,
Respondents

BRIEF OF AMICUS CURIAE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Were the Courts below correct in holding that under the Education for All Handicapped Children Act of 1975 Amber is entitled to the catheterization services she requires to attend public school?

2. Were the Courts below correct when they refused to apply to *de novo* civil actions brought in federal court pursuant to Section 1415 of the Education for All Handicapped Children Act of 1975 a 30-day state statute of limitations which governs on the record appeals from administrative agencies?

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No. 81-1290

IN THE

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ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania and the PENNSYLVANIA DEPARTMENT OF EDUCATION,
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v.

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Respondents

BRIEF OF AMICUS CURIAE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONSENT OF PARTIES

All parties below have granted consent to the Development Disabilities Advocacy Network to file the instant brief. The written verification of this consent has been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The Developmental Disabilities Advocacy Network (DDAN) files this brief in opposition to the Petition for Writ of Certiorari to the U.S. Court of Appeals for the

Third Circuit. Since 1977, DDAN has been the independent agency in Pennsylvania designated by the Governor as the Commonwealth's Protection and Advocacy System pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. Section 6001, *et seq*. As such, DDAN is responsible for providing protection and advocacy services to all developmentally disabled children and young adults in Pennsylvania. *See*, 42 U.S.C. Section 6012.

This case concerns the right of Amber Tokarcik, a handicapped resident of Pennsylvania, to receive, pursuant to the Education for All Handicapped Children Act of 1975, 20 U.S.C. Sections 1401, *et seq.*, the "clean intermittent catheterization" services she requires to attend public school. In addition, Petitioner has presented the question of the applicable statute of limitations in cases arising in Pennsylvania under the section of the Act which grants aggrieved parties the right to bring a civil action in federal district court. 20 U.S.C. Section 1415(e)(2). DDAN, as the statewide advocate for all developmentally disabled youngsters, is in a unique position to present argument to the Court on behalf of this population.

STATEMENT OF CASE

Amicus DDAN adopts the Statement of the Case set forth by Petitioner [Petition at 3-7] with the addition of the following material facts.

The minor Respondent in this individual action, Amber Tokarcik, was born on February 10, 1971, afflicted with the handicapping condition of spina bifida. This congenital physical disability has left her paralyzed from the waist down, confined to a wheelchair, and unable to empty her bladder without "catheterization," a procedure which is utilized to permit necessary voiding of fluids from a non-functioning bladder [App. 31a].[1]

---

1. References to "App." are to the appendix contained in the Petition submitted by Robert Scanlon.

Prior to the mid-1960's, these children were catheterized by the permanent insertion into their bodies of a tube attached to a bag worn externally. Medical studies and research revealed, however, that this indwelling catheter was directly causing many youngsters to die from catheter-related infections. To deal with this problem, a new procedure was devised called "clean intermittent catheterization" ("CIC"). CIC involves the insertion and removal of a small plastic catheter as voiding is required — approximately every four hours [App. 15a-16a].

As the District Court stated in undisputed findings, CIC is no longer considered a surgical procedure but can be done by anyone with a small amount of training; takes only a few minutes to accomplish; and is extremely inexpensive to provide [App. 16a; 21a]. Moreover, and of particular relevance to this case, youngsters such as Amber who have full use of their arms and hands and adequate mental functioning can learn at a relatively early age to self-catheterize[2] [App. 64a-65a].

The instant matter arose upon Amber's entry at the age of five years into the kindergarten of the Forest Hills School District (hereinafter "District") in 1976. The District has agreed with the Tokarciks that Amber, as a handicapped child under the Act, requires specially designed instruction in the form of specially adapted phys-

---

2. Because of Amber's progress to date in learning to self-catheterize, this individual action may already be moot or will become moot prior to a decision of this Court should the Writ issue. Counsel for Respondents has informed counsel for *Amicus* DDAN that Amber, now age 11 years, is self-catheterizing while at school. Amber catheterizes herself in the presence of a school nurse to minimize the possibility of problems arising. The nurse helps her with her clothes and supports her whenever necessary to limit the possibility of her falling. (See letter from Respondent's counsel to counsel for *Amicus* dated January 21, 1982, filed with the Clerk of the Court.)

ical education, as well as certain related services such as transportation.[3] The sole dispute between the Tokarciks and the District regarding Amber's educational program has been whether the Act also required the District to provide CIC to her once or twice daily in accordance with a program designed ultimately to teach Amber to self-catheterize [App. 31a-32a, 64a].

The decisions of the Courts below that Amber is entitled to receive this service from her District and that the filing of this court action with the District Court was timely are the subjects of the Petition for *Certiorari* which is opposed by *Amicus* herein.

---

3. This makes particularly puzzling the argument by Petitioner and by *Amicus* Pennsylvania School Boards Association that Amber is not a handicapped child under the Act. There is no dispute that Amber requires and receives special education from her school district [App. 32a]. *See also*, 20 U.S.C. Section 1401(1), which defines a handicapped child as one who, because of a handicapping condition, requires special education, and Section 1401(16), the statutory definition of special education, which expressly includes specially designed instruction in physical education [App. 87a].

ARGUMENT: THE PETITION SHOULD BE DENIED

I. The Decision of the Court of Appeals That CIC Must Be Provided to Amber Does Not Meet the Criteria for the Granting of a Writ of Certiorari.

A. The Decision of the Court of Appeals is Correct and is Not in Conflict with the Decision of Any Federal Court.

The Education for All Handicapped Children Act of 1975, 20 U.S.C. Sections 1401, *et seq.* (hereinafter "the Act") is a program of cooperative federalism designed to assist states and local school districts in providing education programs to handicapped children. A state which elects to receive money under the Act must provide its school-aged handicapped youngsters with, *inter alia*, "free appropriate public educations." *Id.* at Section 1412(1), [App. 89a]. Local educational agencies, such as school districts, have parallel obligations. *Id.* at Section 1414(a)(1)(C)(ii).

A "free appropriate public education" is defined in pertinent part as "special education and related services." *Id.* at Section 1401(18), [App. 87a-88a]. Each of these terms is then further defined. Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child," *Id.* at Section 1401(16), and related services are

> [t]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. *Id.* at Section 1401(17), [App. 87a].

The Court of Appeals held that Amber was entitled to receive CIC services from her local school district as a related service needed to benefit from her program of special education [App. 65a]. This decision is correct and is consistent with the only other Court of Appeals decision which deals with this issue. *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980).

The Court of Appeals properly held that CIC fell within the general rubric of "related services" as a supportive service; as a type of occupational therapy; and as a school health service, a form of supportive service not expressly listed in the statute, but defined in the implementing regulations [App. 59a; 62a; 64a], 34 C.F.R. Section 300.13(b)(10). The Court stated that CIC is a supportive service in that, "[q]uite simply put, without the provision of CIC, [the child] cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all." Quoting from *Tatro, supra* at 562 [App. 62a].

CIC is also considered occupational therapy for Amber. It is part of a program of self-catheterization prescribed for her by the chief occupational therapist at the Pittsburgh Children's Hospital[4] [App. 19a, 64a].

Finally, CIC is considered a "school health service," and *not* a medical service for other than diagnostic or

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4. As the District Court noted in response to Defendants/Petitioners' "strenuous" objection to considering CIC occupational therapy:

> We think defendants demonstrate an insensitivity to the special problems of the handicapped. Obviously, it is more typical to think of an occupational skill as the ability to type or to drive a truck or to draft a complaint. But surely, if we look closer, behind these very specialized skills is a broad range of every day skills, equally as important to success on the job, such as the ability to move from place to place, to communicate in one way or another, and to attend to our personal body needs, including voiding of the bladder. It is difficult to imagine an employer hiring an individual who could not attend to his own body functioning [App. 19a-20a].

evaluative purposes. The Court of Appeals relied on the undisputed testimony of the Director of Children's Service of the Pennsylvania Department of Health that catheterization is a simple procedure which can be administered by a school nurse or anyone with minimal training and does not require performance by or under the direct supervision of a physician or any other medical person[5] [App. 59a-60a].

In reaching the conclusion that CIC can be considered a related service, the Court properly rejected Petitioners' argument that related services include only "those services targeted to the special educational instructional program and intertwined with it." [App. 57a]. Transportation, for example, is an expressly listed related service whose connection with special education is that it is necessary to provide the handicapped youngster with physical access to the program. CIC is related to special education in the same way.

The holding of the Court of Appeals is firmly based in express statutory language and is in accord with other federal court decisions. *See, Tatro, supra.*

B. The Court's Decision that Amber is Entitled to CIC Does Not Warrant Review By This Court as a Matter of Significant Public Importance in Pennsylvania or Elsewhere.

This is not an appropriate case for this Court to resolve the question of what range of services are encompassed by the statutory term "related services." It is undisputed that CIC services are not expensive, not time-consuming to provide, and not often required. Amber's handicapping condition spina bifida occurs very

5. *Amicus* Pennsylvania School Boards Association urges that CIC is "medical" because it must be prescribed or ordered by a physician [Amicus Brief at pp. 9-11]. This argument has no merit. The Act expressly lists several related services, such as physical therapy and audiological services, which are almost invariably provided under the prescription and order of medical professionals. 20 U.S.C. Section 1401(17) [App. 87a].

rarely, afflicting only one or two children in every thousand births, not all of whom require catheterization [App. 21a; 61a]. In fact, both Courts below acknowledged that if Amber were denied catheterization services, she would not be able to attend school with her non-handicapped classmates, but would require more expensive in-home services [App. 15a; 34a]. As the District Court eloquently stated:

> The concern of the defendants in this case, as well as the concern of the trial court which the Fifth Circuit overruled in *Tatro,* is to establish realistic limits to the requirements of the Handicapped Children Act. We are sympathetic to this concern. But wherever these limits may be found, they are surely not to be set to exclude a service which can require no more than a few minutes a day, and either no expenditure of funds, . . . or very little expenditure of funds. . . . [App. 21a].

Moreover, even assuming, *arguendo,* that CIC were not within the coverage of the related services section of the Act, the Court of Appeals held that its provision would be mandated by other sections of the Act. For example, 20 U.S.C. Section 1412(5)(B) requires states to provide "supplementary aids and services" necessary to enable handicapped youngsters to attend school with children who are not handicapped, rather than in segregated settings. [See *Id.* at Section 1414(a)(1)(C)(iv) for parallel obligation of local educational agencies.] This "mainstreaming" provision of the Act is particularly appropriate in a case such as Amber's, where an inexpensive service is the difference between virtually complete integration and total segregation [App. 21a-22a; 61a].

Amicus DDAN also strongly urges that, for Amber, the provision of CIC was part of a systematic program of learning to self-catheterize. Thus, for her, CIC is also special education. In fact, Amber's CIC program has already partially accomplished its goal of making her com-

pletely self-sufficient in this basic, necessary life skill. The school district no longer really "provides" CIC, but merely provides supervision for Amber while she self-catheterizes. (See p. 3, fn. 2, *supra*).

Finally, the Court acknowledged that the provision of CIC to youngsters like Amber is mandated by Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. Section 794, which prohibits federally assisted agencies such as school districts from denying benefits to handicapped persons. See also, *Tatro, supra* at 564; *Hairston v. Drosick*, 423 F. Supp. 180 (D.W. Va. 1976). A claim under this statute was not presented at the level of the Court of Appeals because of certain procedural irregularities which arose in this case [App. 33a; 62a-63a].

The decision of the court in this case by no means mandates the provision of large numbers of expensive health care services by local school districts. Neither is there any basis for Petitioner's assertion that the lower Court's decision will result in "an undue and substantial burden on available state and federal funds for special education." [Petition at 13]. This decision of the Court of Appeals merely mandates the provision of one particular service under a particular set of facts.

The criteria for the granting of a Writ have not been met and the Petition should be denied.

II. The Decision of the Court of Appeals to Reject a 30-day Statute of Limitations for Actions Brought in Pennsylvania Under Section 1415 is Correct and Does Not Meet the Criteria for the Granting of a Writ of Certiorari.

In addition to its central requirement that school-aged handicapped children in participating states receive free appropriate public educations, the Act mandates that a series of extensive procedural safeguards be provided by state and local educational agencies to handicapped children and their parents. 20 U.S.C. Sections 1412(5); 1414(a)(7); 1415, [App. 91a, 92a]. When

disputes among the parties occur regarding, *inter alia*, the content of an individual child's program of special education and related services, a parent has the right to request a hearing before an impartial hearing examiner. Any party aggrieved by a decision of the hearing examiner, or the administrative decision on appeal from the ruling of the hearing examiner, has

> the right to bring a civil action with respect to the complaint . . . which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. . . .

Id. at Section 1415(e)(2), [App. 93a-94a]. The Act itself provides no limitation period for the initiation of a civil action.

The Court of Appeals concluded that the Pennsylvania statutes of limitations proposed by the Petitioner, all of which were 30 days or less, were not applicable to actions under Section 1415 of the Act.[6] The Court's decision in this regard is correct and is consistent with the decisions of all other federal courts which have considered this issue. See, e.g., *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd on other grounds*, 645 F.2d 592 (8th Cir. 1981).

Contrary to the assertion of Petitioner, the analysis of this issue by the Court of Appeals was in full accord with prior decisions of this Court. *See, United Parcel Services, Inc. v. Mitchell*, _____ U.S. _____, 101 S.Ct. 1559 (1981). In determining what limitation period would be applicable in the forum state, the Court of Appeals sought to identify an analogous state statute in Pennsylvania [App. 39a-40a].

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6. In fact, the Court of Appeals did not even reach the issue of precisely which Pennsylvania statute of limitations *did* apply, holding only that, under any of the alternate state statutes potentially applicable, the instant action was timely [App. 55a]. The Court's decision, therefore, does not preclude Petitioner from raising in a subsequent litigation an alternate state statute of limitations of less than two years in length, but more than 30 days.

The 30-day statute of limitations which Petitioner proposed to the Courts below, governs appeals from state administrative agencies to state court. Pennsylvania Administrative Agency Law, 42 Pa. C.S.A. Section 5571(b) (Purdon Supp. 1981). That statute provides that the appellate court shall base its review entirely on the administrative record below, and that the court must affirm the agency's determination unless that determination is contrary to law or based on factual findings not supported by substantial evidence. 2 Pa. C.S.A. Section 704.

In rejecting this statute as governing claims not sufficiently analogous, the Court of Appeals noted that proceedings brought pursuant to Section 1415(e)(2) are characterized as "civil actions," and that the Congressional Conference Committee had expressly deleted the word "appeal" from the House version of Section 1415 in favor of the current language [App. 40a]. *See*, 121 Cong. Rec. 36635-6 (1975) (Joint Explanatory Statement of the Committee of Conference). Moreover, under Section 1415(e)(2), while the Court is to receive the administrative record, it is in no way bound by it, must hear additional evidence upon the request of any party, must base its decision on the preponderance of the evidence, and "shall grant such relief as the Court determines is appropriate." [App. 94a].

Finally, the Court of Appeals expressed strong concern for the federal policy behind Section 1415 and the remainder of the Act, and found that the Congressional purpose in providing Court review would be "frustrated" by the application of a 30-day limitation period. The Court reasoned that 30 days was simply "too brief" in view of the strong Congressional concerns that a full and supplemented record be presented to the court and that courts act as an "external check" on administrative decisions by reaching an independent decision.[7] Further,

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7. The Court in *United Parcel Services, Inc. supra*, applied a 90-day state statute of limitations, three-fold the time limitation urged by Petitioner herein, to actions brought in New York under

parents, who are often not represented by counsel below, must have full opportunity to consider and prepare for federal court litigation [App. 46a-50a]. Accordingly, the Court properly refused to adopt the 30-day time bar proposed by Petitioner and utilized an analysis in accord with prior decisions of this Court.

Nor is there any impact of sufficient public importance arising from the lower Court's decision to warrant review by this Court. Obviously, this decision applies only in the forum state of Pennsylvania and does not even end the inquiry of what limitation period is applicable in that forum [App. 55a]. However, Petitioner contends that this Court should grant review because the Court of Appeals' holding, taken together with the "stay put" provisions in Section 1415(e)(3), could unduly delay final placement decisions and harm handicapped youngsters [Petition at 9-12]. Such harm is purely hypothetical, is not dictated by the Court's decision, and does not necessarily follow from the Act itself.

Even had the Court of Appeals affirmatively held that Pennsylvania's two or six year statute of limitations was applicable to federal actions under Section 1415 in that state, it did not hold, and it is by no means clear, that the educational placement of a child would have to be held in abeyance "for over two years while . . . the *possibility* of appeal to Federal Court . . . [is] pending." [Petition at 10, *emphasis in original*]. The Act states only that the then current placement of the child not be changed, unless the parties agree otherwise, "[d]uring the *pendency* of any proceeding . . ." 20 U.S.C. Section 1415(e)(3), [App. 94a] (*emphasis added*). Hence it is possible that if no proceeding is pending, the "stay put"

NOTE 7 — *(Continued)*

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a) (1976). There, the Court held that a 90-day period would further the purpose of the federal act and that the nature of the claim was sufficiently analogous to that governed by the state statute.

provisions of Section 1415(e)(3) are inapplicable. Most importantly, however, the instant matter, which was filed in District Court less than 90 days from the date of the state administrative decision, and which did not present any issue relevant to the "stay put" provision, simply does not present the hypothetical concerns raised by Petitioner.

The decision of the Court of Appeals was properly reached, assures that the parties will have sufficient time to exercise their rights under the Act in furtherance of the purpose of the Act, causes no harm to handicapped children, their parents, or education officials, and has limited impact. Review by this Court should be denied.

CONCLUSION

The criteria for the granting of a Writ of Certiorari have not been met. Accordingly, the Petition should be denied.

Respectfully submitted,

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Amicus Brief

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No.

In the Supreme Court of the United States

October Term, 1981

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania, and the PENNSYLVANIA DEPARTMENT OF EDUCATION,
Petitioners

vs.

AMBER TOKARCIK et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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CONSENT OF PARTIES

The parties have granted consent to the Pennsylvania School Boards Association, Amicus Curiae, to file the instant brief. Copies of the parties' written consent are appended hereto.

INTEREST OF THE AMICUS CURIAE

The Pennsylvania School Boards Association is a voluntary association composed of the five hundred and one (501) local school districts of the Commonwealth of Pennsylvania and the members of the school boards of those districts. The Pennsylvania School Boards Association was organized in 1895 and is the first such association in the nation and has as its function the rendering of assistance to local school districts and the representation of the general public interest in the field of public education.

The instant matter concerns the proper interpretation of the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U.S.C. §1401 *et seq.* (hereinafter referred to as "94-142" or the "Act"). Within the scheme of public education and pursuant to state law, each of the five hundred and one (501) local school districts of the Commonwealth of Pennsylvania is delegated the responsibility of locating, identifying and providing special education and related services to handicapped students resid-

ing in their respective school districts. Public School Code of 1949, Act of 1949, March 10, P.L. 30, §1371 *et seq.*, 24 P.S. §13-1371 *et seq.* Consequently, judicial decisions interpreting 94-142 will impact directly upon Pennsylvania school districts. Therefore, as the association which represents the interests of Pennsylvania's public schools, the Pennsylvania School Boards Association is vitally concerned with the outcome of any litigation affecting the operation of the public schools and the costs of operating said schools.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by your Honorable Court and has decided it in a way which conflicts with the express statutory provisions of the Act by ignoring the Act's definition sections and by mandating that the Commonwealth of Pennsylvania and the Forest Hills School District provide a medical service. Perhaps more importantly, though, the decision, because it conflicts with various statutory provisions, has the potential of enlarging the class of children covered by the Act and expanding the scope of services to be provided to that class. Consequently, although the specific question to be decided—to wit, whether clear intermittent catheterization (hereinafter referred to as "CIC" or "Catheterization") is a "related service" as defined by 94-142[1]—is obstensibly narrow, the effects of the decision below and any decision rendered by your Honorable Court will be broad, affecting thousands of public school students and local school districts across the nation. Lastly, because of the finite resources available for public education, any decision which has the effect of expanding services and therefore increasing costs will necessarily result in diversion of resources from other areas of public school setting necessarily result-

[1] The Petitioners have also raised a second issue dealing with the appropriate statute of limitations for filing an action in Federal Court under 94-142. Amicus Curiae joins the Petitioners on that issue, but will present no argument in this brief on that issue.

ing in a curtailment of both the regular school program and other aspects of special education.

I. The decision below is in conflict with the definitional sections of the Act.

At bar, the relevant statutory provisions are the definitions of "handicapped children", "related services" and "special education". The Act defines those terms as follows:

> "(1) The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, *who by reason thereof require special education and related services.*" (Emphasis added) 20 U.S.C. §1401 (1).
>
> "(16) The term 'special education' means *specially designed instruction,* at no cost to parents or guardians, to meet the unique needs of the handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions." (Emphasis added) 20 U.S.C. §1401 (16).
>
> "(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and

counselling services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a handicapped child to benefit from special education,* and includes the early identification and assessment of handicapped conditions in children." (Emphasis added) 20 U.S.C. §1401(17).

However, as stated previously, the lower court's decision completely miscontrues the aforesaid definitions.

A.

The court below improperly stated that special education could be regular education.[2] At F.2d , the court said that special education "deals with the proper environment in which to educate a child." And at F.2d , the court said that "since an appropriate education for a physically handicapped child with a normal intellectual capacity aims at promoting achievement roughly equal to that of her non-handicapped peers, special education for Amber should entail classroom instruction, for the nature of her handicap is not so severe as to preclude the possibility of education in a regular environment." However, special education is not regular education and does not contemplate merely the environment in which education is provided. Instead, it is, by definition, "specially designed instruction". 20 U.S.C. §1401(16). It is true that specially designed instruction may be provided in a regular

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[2] It must be remembered that except for adaptive physical education, the child in this case received no special education. She functioned normally in a regular classroom setting, receiving a regular classroom curriculum.

classroom setting, but a physical handicap of an otherwise normal child who is in no need of special education (i.e., specially designed instruction) does not convert that child's regular education into special education. If it did, all "orthopedically impaired" or "health impaired" children throughout the nation, without regard to their need for "specially designed instruction" or educational supportive services would be counted among the handicapped under the Act. For example, otherwise normal children functioning normally in a regular classroom setting, but who have a bladder disorder requiring catheterization or a kidney dysfunction requiring renal dialysis, would be considered handicapped and entitled to catheterization or renal dialysis despite the fact that they are not in need of specially designed instruction. Not only would this inflate the number of children who could huddle under the protective umbrella of the Act and lay claim to its benefits, but it would inflate the number of handicapped children for whom the states can claim funds under the grant provisions of the Act.[3] That is not what Congress intended.

Instead, by the clear and unmistakable language of 94-142, to be handicapped as defined in the Act, the child must need "special education" (i.e., specially designed instruction) and "related services". The related services to which the child is entitled are those which are "required to

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[3] Pursuant to 20 U.S.C. §1411, the largest portion of the funds received by a state under the Act is based upon the number of handicapped children in the state. Therefore, an inflation of the number of handicapped children in each state and across the nation, as a result of improperly loose definitions of such phrases as "special education" and "handicapped children" improperly enlarges the grants and financial responsibility of the federal government well beyond what Congress intended.

assist a handicapped child to benefit from *special education"*, 20 U.S.C. §1401(17) (emphasis added), as distinguished from regular education. This was precisely the analysis adopted by the lower court in *Tatro vs. Texas,* 481 F. Supp. 1224 (W.D. Tex. 1978), *rev'd,* 625 F.2d 557 (5th Cir. 1980), wherein it was said:

> "[T]he court finds that to be related in the statutory sense the service required must arise from the effort to educate. There is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life but once that life maintenance service is provided, it is unrelated to her learning skills.
>
> This court has not been presented with any evidence in the legislative history which would indicate that the term 'related services' can be construed as broadly as plaintiffs urge. To the contrary, language used while evincing a broad purpose carefully limits the means of achieving them. For example, medical services while illustrated by a listing of a variety of services is carefully limited to diagnostic and evaluation purposes. That qualification is inconsistent with finding a congressional intent to furnish all support services needed by persons during school not because of the schooling but because that care is always required." 451 F. Supp. at 1227.

Consequently, the lower court, by ignoring the Act's statement that special education is specially designed instruction, improperly concluded that special education may be regular education.

B.

The court below also improperly concluded that "related services" need not be *related* to special education. At F.2d , the court said that " 'related services' need not be education-specific. . . ." And at F.2d , the court said that where a student is in a regular classroom, related services require "only that the school make the classroom physically accessible to Amber—which it has done with the transportation service—and reasonably provide for health needs that might otherwise interfere with classroom performance."

However, the only developmental, corrective and supportive services required by the Act are those necessary "to assist a handicapped child to benefit from special education". 20 U.S.C. §1401 (17) There is nothing in the statutory definition of related services dealing with physical access to classrooms or with health needs generally.[4] On the contrary, of all the services needed physically to place a child in school, only transportation was named as a related service in the Act.

Therefore, as it did with special education, the lower court ignored a critical portion of the Act's definition and improperly concluded that related services deals with physical access to school and health needs of students which may be unrelated to the educational program.

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[4] The fact that Congress did not intend the phrase "related services" to deal with physical accessability to regular classrooms is made clear by the various specific statutory and regulatory provisions dealing with physical access to schools and classrooms. *See,* 20 U.S.C. §1406; 42 U.S.C. §4151 *et seq.;* 45 C.F.R. §84.21 *et seq.*

II. The decision below improperly requires school districts to provide medical services.

School districts are not required to provide medical services under 94-142, except for diagnostic or evaluation purposes. 20 U.S.C. §1401(17). In *Battle vs. Commonwealth of Pennsylvania,* 629 F.2d 269 (3d Cir. 1980), the court noted that " 'related services' include only those medical services necessary for diagnosis and evaluation." 629 F.2d at 372, n. 3. In this light, we submit that catheterization is a medical service and that the court below, therefore, improperly ordered the provision of a medical service.

The lower court based its conclusion that catheterization is not a medical service upon two suspect premises. First, the court restricted the concept of medical services to mean those services that only a physician can perform. Second, the court noted that CIC is a school health service. Both premises, however, lack foundation.

A.

Medical services are nowhere defined by 94-142 or by regulation. Therefore, the term should be construed according to its commonly understood meaning. In that light, we submit that medical services are those services performed or *ordered* by a physician, which embrace the exercise of judgment as to the nature, character and symptoms of a disease, the determination of the proper remedy for the disease, and the giving, treating, or prescribing of a remedy for the disease. *See, Berg vs. New York Society for Relief,*

136 N.Y.S. 2d 528 (1954). Medical services are not and should not be limited to services which only a physician can perform, as was held by the court below. F.2d at . Such a narrow definition of the term medical services lacks judicial support (*but see Tatro vs. Texas,* 625 F.2d 557 (5th Cir. 1980)) and is inconsistent with how the phrase has been construed by the courts in various settings.

For example, in *Albright vs. Hook,* 381 N.Y.S. 2d 217, 85 Misc. 2d 403 (1976), the question was whether heat treatment, massage and ultrasound prescribed by, but not performed by, a physician was a medical service under New York's automobile "no-fault law". In concluding that such services were medical services, the court said:

> "No clear line can be drawn distinguishing the practice of medicine itself from the administration of treatment at a physician's direction. * * * The definition of 'medicine', thus, must be functional and flexible enough to include treatment prescribed and supervised, if not performed by a physician. It should not be narrowly constricted. It is certainly broad enough to include physical therapy, when it is good accepted community practice supervised directly by a physician. Excluding such therapy would be analogous to considering the administration of drugs as medical services only when a physician himself injects the medicine and not when a nurse does so at a physician's direction." 381 N.Y.S. 2d at 219-220.

Similarly, in *The Case of Klapacs,* 242 N.E.2d 862, 355 Mass. 46 (1968), a claim was made under Massachusetts' Workmen's Compensation Law for services performed by the claimant's wife, who happened to be a nurse. In disallowing the claims, the court said that "the

term 'medical services' as used in the statute is inclusive of the services of a nurse or trained attendant rendered under the direction and control of a physician . . ." 242 N.E. 2d at 864-865.

Lastly, in *Brown vs. Moore,* 247 F.2d 711 (3d Cir., 1957), the court concluded under Pennsylvania law that a sanitarium's furnishing of attendance by a non-physician following electroshock therapy to a patient is a medical act, even though not performed by a physician, because the physician orders the attendance after determining the extent and duration of the attendance required to safeguard the patient. 247 F.2d at 715, n. 4.

Consistent with the foregoing, 94-142 speaks in terms of medical services, not physician's services. The Act does not exempt merely physician's services from the definition of "related services", but instead exempts the broader range of medical services. Therefore, the lower court's premise that medical services are only those which a physician can perform is clearly incorrect.

In terms of the matter at bar, catheterization is undoubtedly a medical procedure. Its necessity, continued use and propriety are all determined by a physician based upon medical criteria and medical judgment. No one argued, or even suggested, that anyone but a physician can order catheterization to be provided, continued or ceased. Consequently, catheterization, pure and simple, is a medical service and as such, is specifically removed from the mandates of 94-142.

B.

Despite being a medical service, the lower court characterizes catheterization as a "school health service", adopting the concept of "school health service" from the regulations promulgated pursuant to 94-142 which provide that "related services" include "school health services." 45 C.F.R. §121a.13(b) (10). School health services are defined as "services performed by a qualified school nurse or other qualified person". However, the regulations cannot be construed to require medical services, by whatever name, when the statute specifically excludes medical services as a requirement except for diagnosis or evaluation. Instead, it is more reasonable to conclude that "school health services" as defined above, refer only to non-medical services which are provided in school by a "qualified school nurse or other qualified person." On that score, Section 1402 of the Public School Code outlines the following health services to be provided by the schools in the Commonwealth of Pennsylvania:

> " (a) Each child of school age shall be given by methods established by the Advisory Health Board, (1) a vision test by a school nurse, medical technician or teacher, (2) a hearing test by a school nurse or medical technician, (3) a measurement of height and weight by a school nurse or teacher, (4) tests for tuberculosis under medical supervision, and (5) such other tests as the Advisory Health Board may deem advisable to protect the health of the child. Vision tests shall be given at least annually and other tests at intervals established by the Advisory Health Board.
>
> (a.1) Every child of school age shall be provided with school nurse services: Provided, however,

that the number of pupils under the care of each school nurse shall not exceed one thousand five hundred (1,500).

(b) For each child of school age, comprehensive health records shall be maintained by the school district or joint school board, which shall include the results of the tests, measurements and regularly scheduled examinations and special examinations herein specified.

(c) Medical questionnaires, suitable for diagnostic purposes, furnished by a Secretary of Health and completed by the child or by the child's parents or guardians, at such times as the Secretary of Health may direct, shall become a part of the child's health record.

(d) All teachers shall report to the school nurse or school physician any unusual behavior, changes in physical appearance, changes in attendance habits and changes in scholastic achievement, which may indicate impairment of a child's health. The nurse or school physician or school dentist may, upon referral by the teacher or on his own initiative, advise the child's parent or guardian of the apparent need for special medical or dental examination. If a parent or guardian fails to report the results to the nurse or school physician, the nurse or school physician shall arrange a special medical examination for the child.

(e) The school physicians of each district or joint board shall make a medical examination and a comprehensive appraisal of the health of every child of school age, (1) upon original entry into school in

the Commonwealth, (2) while in sixth grade, (3) while in eleventh grade, and (4) prior to the issuance of a farm or domestic service permit unless the child has been given a scheduled or special medical examination within the preceding four months. The health record of the child shall be made available to the school physician at the time of the regularly scheduled health appraisals.

(f) The Secretary of Health, upon petition of the school board or joint school board or on his own initiative with the concurrence of the school board or joint school board, may modify for individual school districts the school health services programs specified in this section. The program as modified shall conform to approved medical or dental practices and shall permit valid statistical appraisals of the various components of the program." Act of 1949, March 10, P.L. 30, §1402, 24 P.S. §14-1402.

From the foregoing, it is clear that the school health services provided in Pennsylvania schools fall far short of including the medical services involved in this case.

The court below places some weight upon the testimony of a Dr. Lynch who considered catheterization to be a service which a nurse can perform. It is true that a nurse can perform catheterization, assuming that there is a proper physician's order authorizing catheterization,[5] but with-

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[5] Under Pennsylvania's Nurse Practice Act, Act of 1951, May 22, P.L. 317, §1 *as amended*, 63 P.S. §211 (P.P. 1981-1982), nurses may execute only those medical regimens "prescribed by a licensed physician...." 63 P.S. §212(1).

out a physician's order, nurses may not provide catheterization.[6]

Consequently, in view of the foregoing, catheterization is a medical service, by whatever name, which the Act specifically excludes from coverage.

III. A holding that the Commonwealth and the school district are not required to provide catheterization will not remove the child from the normal classroom.

A thought adopted by both the District Court and the Circuit Court was that if the Commonwealth and the school district are not ordered to provide catheterization, the school district will have to educate the child at home or in a special class, thereby frustrating the aims of mainstream-

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[6] Both the District Court and the Circuit Court below gave considerable weight to the testimony of Dr. Lynch to support the proposition that catheterization is a health service. F.2d at , F. Supp. at . However, there is a serious question as to whether Dr. Lynch's testimony is competent or supports the proposition for which it was cited. First, she correctly noted that catheterization is a medical service. (See, Notes of Testimony of Administrative Hearing, p. 26) Second, Dr. Lynch testified that as far as she knows, "[i]t is a matter of interpretation as to whether the current law in Pennsylvania . . . limits medical services. That is not a program that I administer. . . ." (*Id.* at 25-26) Further, Dr. Lynch was unable to identify any statute or regulation that indicated in any way that school nurses were permitted or required to administer catheterization. Lastly, Dr. Lynch in no way disputed the concept that catheterization can be administered by a nurse only on orders of a physician.

ing and the concept of least restrictive environment. See, 20 U.S.C. §1412(5).[7] Principally, there is no support for such a thought either under the law or pursuant to the facts in this case. If the school district cannot or is not required to provide CIC, the child will still have to attend school and her family will have to make suitable arrangements to provide in-school CIC. Therefore, in a much larger sense, the Courts' thought raises the question as to when the responsibilities of parents end and those of the public schools begin.

The appropriate education for the child in this case is a regular educational program in a regular classroom with no specially designed instruction. Under Pennsylvania's compulsory attendance laws, we submit that the parents have an obligation to insure the child's attendance at school and that the obligation cannot be shirked on the premise that it is inconvenient or burdensome for the parents to provide catheterization to their child so that she can attend school.[8] The fact of the matter is, in the instant case, some member of a child's family had gone to school each day to catheterize the child.

It cannot be gainsaid that parents have obligations to their children, and through the compulsory attendance law, they have obligations and responsibilities to the schools.

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[7] The Circuit Court made this comment in footnote 26 of its decision: "Indeed, if the school district did not have a nurse or aide available to catheterize Amber, it would still be obligated to provide her with an appropriate education. And the two possible alternatives—at home instruction or a special class for the handicapped—would appear to be less cost benficial."

[8] Act of 1949, March 10, P.L. 30, §1327 *et seq., as amended*, 24 P.S. §13-1327 *et seq.* (P.P. 1981-1982).

Parents certainly have the responsibility as parents to tend to their children's medical needs and there is certainly nothing in 94-142 which indicates that the parents' responsibility to tend to a child's medical needs has been reduced or eliminated in any way. We submit, for example, that parents have the obligation to provide eyeglasses, back-braces, dental care, wheelchairs, insulin injections, renal dialysis and other health related services to their children when their children need such services; and in no way is it indicated that that responsibility has been reduced or modified in 94-142. The child in this case is in a wheelchair and needs that wheelchair (or some other similar device) to attend school as much as the child needs catheterization. We submit, however, that just as everyone recognizes that the provision of the wheelchair is the responsibility of the parents in this case, not of the school district, the provision of catheterization is equally the responsibility of the parents.

The lower court commented that catheterization is not that costly and would not therefore be that burdensome upon the school district and the Commonwealth. However, that completely misses the point. The true question is who is responsible for providing the service, the schools or the parents. Obviously, if catheterization is not that costly, it would not be that costly or burdensome for the parents to perform either. But the cost of the service is not the issue. Instead, as addressed in the prior sections of this brief, Congress specifically provided that 94-142 did not mandate medical services, except for diagnosis and evaluation, clearly implying that parents would remain responsible for those types of services.

In view of the foregoing, it is respectfully submitted that the lower court erred by indicating that Amber Tokarcik would not be able to attend regular school if the school district were not ordered to provide catheterization.

CONCLUSION

In view of the foregoing, it is respectfully requested that your Honorable Court grant the Petition for Certiorari in this matter.

AND IT WILL EVER PRAY.

CLECKNER AND FEAREN

By (s) William Fearen
William Fearen,

By (s) Michael I. Levin
Michael I. Levin,
(Counsel for Amicus Curiae, Pennsylvania School Boards Association)

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

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December 9, 1981

Michael I. Levin, Esq.
Cleckner and Fearen
31 North Second Street
Harrisburg, PA 17101

Re: *Amber Tokarcik v. Forest Hills School District,*
Nos. 80-2844/2845

Dear Mr. Levin:

In confirmation of our telephone conversation of December 8, 1981, on behalf of the Pennsylvania Department of Education and Secretary Scanlon, I hereby grant you permission to file an amicus brief before the U.S. Supreme Court in the above matter.

If I can be of any further assistance to you in this matter, please contact me.

Very truly yours,
(s) Ernie
Ernest N. Helling
Counsel for the
Department of Education

Consents

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Reply to: Main Office December 7, 1981.

Pennsylvania School Boards Association
31 N. Second Street,
Harrisburg, PA 17101

ATTENTION: MICHAEL I. LEVIN, ESQ.

RE: PROPOSED APPEAL FOR CERTIORARI TO UNITED STATES SUPREME COURT IN TOKARCKI, et al., VS. FOREST HILLS SCHOOL DISTRICT, et al.

Consents

Dear Attorney Levin:

In accordance with your telephone request this is to certify that I have no objections to the Pennsylvania School Board's Association's joining the Defendants as amicus in the above captioned case in their application to the United States Supreme Court for a Writ of Certiorari.

Very truly yours,

(s) Edward R. Schellhammer,
Edward R. Schellhammer,
Attorney for Amber Tokarcik, et al., Plaintiffs

ERS:ck
Carbon copy to Ernest Helling, Esq., 333 Market Street, Harrisburg, PA 17126, and Gilbert E. Caroff, Esq., Wallace Building, 406-410 Main Street, Johnstown, PA 15901.

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Gilbert E. Caroff
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December 15, 1981

Harrisburg, PA 17101
Pennsylvania School Boards Association
31 N. Second Street

ATTENTION: Michael I. Levin, Esquire

RE: Proposed Appeal for Certiorari to United States Supreme Court in Tokarcik, et al., vs. Forest Hills School District, et al.

Dear Attorney Levin:

The Forest Hills School District has no objection to your request to join the Defendants as amicus in the above captioned case in their application to the United States Supreme Court for a Writ of Certiorari.

Very truly yours,
(s) Gilbert E. Caroff
GILBERT E. CAROFF
Attorney for Defendants

dll
cc: Edward R. Schellhammer, Esq., Suite 500, Swank Building, 616 Main Street, Johnstown, PA 15901
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